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CRIMINAL DOCKET

UNITED STATES DISTRICT COURT

THE UNITED STATES

vs.

SAMUEL BRONSTON

DATE	PROCEEDINGS
10- 2-69	Filed indictment.
10- 7-69	* * * Deft. appears voluntarily. Pleads NOT GUILTY, * * *. COOPER, J.
11-10-69	Filed affdvt & notice of motion to dismiss counts 1 & 2 of the indictment * * *
11-25-69	SAMUEL BRONSTON—Motion to Dismiss argued DECISION RESERVED. Other motions held adjd to 12-23-69 (Judge FRANKEL has papers). FRANKEL, J.
1- 8-70	Filed memorandum * * * The motion to dismiss is denied * * * the foregoing embodies the Court's rulings. No further order need be settled. (mailed notice) FRANKEL, J.
1-27-71	Jury trial begun before TENNEY, J.
1-28-71	Trial Cont'd.
1-29-71	Trial Cont'd.

Relevant Docket Entries.

DATE	PROCEEDINGS
2- 1-71	Trial Cont'd.
2- 2-71	Trial Cont'd. and concluded—Jury verdict—GUILTY ct. 1 & NOT GUILTY on ct. 2. Deft. motion to set aside verdict on ct. 1, Dec. Res. P.S.I. Ordered, Sentence adjd. until 3-16-71. Bail fixed in the sum of $10,000. P.R.B. to be secured by depositing $1,000. cash with the clerk of Court, to be posted by 4 p.m. 2-3-71. To include continental limits of U.S. & Europe. TENNEY, J.
4-15-71	Filed notice of motion for judgment of acquittal (TENNEY, J.)
4-15-71	Filed Opinion #37545 by Tenney, J. * * * Deft's motions in all respects are denied. (see opinion) m/n TENNEY, J.
4-21-71	Filed Judgment (atty present) # It is adjudged that the imposition of prison sentence on count 1 is suspended. Deft. is placed on probation UNSUPERVISED for a period of SIX (6) MONTHS subject to the standing probation order of this Court. Deft is fined $2,000 on count 1 to be paid within the period of probation at such times and in such amounts as the probation officer may direct, or the deft. is to be committed until the fine is paid or he is otherwise discharged according to law. TENNEY, J.
4-23-71	Filed notice of appeal to the U.S. Court of Appeals.
1-12-72	Filed true copy of C.A. judgment and order with mandate attached affirming D.C. judgment.

Relevant Docket Entries.

GENERAL DOCKET

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DATE	PROCEEDINGS
5- 4-71	Filed statement of docket entries and copy of notice of appeal (Bronston)
9-28-71	Argument heard (by: Lumbard, Mansfield and Oakes CJJ)
12-10-71	Judgment Affirmed, Oakes, CJ
12-10-71	Dissenting in separate opinion, Lumbard, CJ
12-10-71	Filed judgment
1-11-72	Issued Mandate (opinion & judgment)
2-10-72	Filed notice of filing of petition for writ of certiorari
4-24-72	Filed certified copy of order of Supreme Court granting petition for writ of certiorari

Indictment.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

The Grand Jury charges:

1. From on or about the 5th day of June, 1964, and continuing up to and including the 28th day of June, 1968, in the Southern District of New York, a proceeding was commenced in which a law of the United States authorizes an oath to be administered, to wit, an arrangement pursuant to Chapter XI of the National Bankruptcy Act (Title 11, United States Code, Sections 701-799), relating to Samuel Bronston Productions, Inc., debtor, of which Samuel Bronston, the defendant, was president and sole stockholder. As part of that proceeding an examination of Samuel Bronston, the defendant, was conducted pursuant to Section 21-a of the National Bankruptcy Act, Title 11, United States Code, Section 44, before the United States District Court (in Bankruptcy), the Hon. Edward J. Ryan, Referee, presiding, at the request of Pierre duPont, a claimant in the said proceeding.

2. It was material to the aforesaid proceeding to ascertain the location of and the existence of any assets of the aforesaid debtor corporation, and the existence and location of any bank accounts, domestic or foreign, wherein those assets might be found. It was also material to that proceeding to ascertain if Samuel Bronston, the defendant, had used any of the assets of the aforesaid corporation for his own personal advantage and had used or possessed

any bank accounts located in foreign countries, in which the debtor's assets might be located.

3. On or about the 10th day of June, 1966, in the Southern District of New York, Samuel Bronston, the defendant, having duly taken an oath before the competent tribunal described in paragraph "1" of this indictment, that he would testify truly, did unlawfully, wilfully, and knowingly, and contrary to such oath, with respect to the aforesaid material matter, make statements which he did not believe to be true, as follows:

Q. Do you have any bank accounts in Swiss banks, Mr. Bronston? A. No, sir.

Q. Have you ever? A. The company had an account there for about six months, in Zurich.

Q. Have you any nominees who have bank accounts in Swiss banks? A. No, sir.

Q. Have you ever? A. No, sir.

4. The aforesaid testimony of Samuel Bronston, the defendant, as he then and there well knew, was untrue in that he did have an account at the International Credit Bank of Geneva, located in Geneva, Switzerland, during the years 1959, 1960, 1961, 1962, 1963, and 1964.

(Title 18, United States Code, Section 1621)

SECOND COUNT

5. The Grand Jury repeats and realleges paragraph "1" herein of this indictment.

6. It was material to the proceeding described in paragraph "1" of this indictment to ascertain the location of and the existence of any assets of the aforesaid debtor corporation and whether any of those assets were in the

possession of Samuel Bronston, the defendant, and whether any assets of the debtor corporation had been used for the personal advantage of Samuel Bronston, the defendant.

7. On or about the 10th day of June, 1966, in the Southern District of New York, Samuel Bronston, the defendant, having duly taken an oath before the competent tribunal described in paragraph "1" above of this indictment, that he would testify truly, did unlawfully, wilfully, and knowingly, and contrary to such oath, with respect to the aforesaid material matter, make statements which he did not believe to be true as follows:

Q. Mr. Bronston, did S.B.P.I. make a film called Valley of the Fallen in 1962 or 1963? A. Yes, sir.

Q. Was that film completed? A. Yes, sir.

Q. On whose behalf was the film made? A. I don't understand your question, I'm sorry.

Q. Well, who owned the film? A. This film was made for the Spanish Government.

Q. For the Spanish Government? A. Yes, sir.

Q. Did it pay for it? A. No, this was our—

Q. Where is that film now, who has the negative? A. The Spanish Government.

Q. The Spanish Government? A. Yes, sir.

Q. What about a film called Sinfonia Espanola, was that made by Samuel Bronston Productions, Inc.? A. For the Spanish Government, sir, for the World's Fair.

Q. And who paid for it? A. Our company paid for it?

Q. Who has the negative to that film? A. Spanish Information Ministry.

Do you have any interest whatsoever in that film? A. No, sir.

Q. Have you been trying to sell it lately? A. I was trying to sell it for the Spanish Government.

Q. For the Spanish Government? A. Yes, sir.

Q. To whom were you trying to sell it? A. Well, we contacted Pan American, TWA, the carriers that operate in Spain.

Q. And you were trying to sell it to them as agent for the Spanish Government? A. Yes, sir.

Q. Did you have any interest whatsoever in the proceeds of any such sale? A. Well, I hoped that the proceeds will go to the Spanish creditors. And I'm still trying to sell it.

Q. You are quite clear, Mr. Bronston, that that sale was not on your account directly or indirectly? A. No, sir.

Q. And it was for the Spanish Government? A. Yes, sir.

Q. And the Spanish Government was to get the proceeds of the sale? A. Yes, sir. And the Minister of Information wrote a special letter to Mr. Tillinghouse, the president, and the reason why the deal didn't go through is because you stopped it, sir.

Q. Is that right? A. Yes, sir.

Q. In any event, that was the Spanish Government's property? A. Yes, sir.

* * * * *

Q. How many films did you make for the Spanish Government? A. Four.

Q. Four? What was the fourth? A. Those are documentary. You have the Valley of the Fallen, Sinfonia, Camino Real, and another 17-minute film on the Spanish economy.

Q. And you were paid nothing by the Spanish Government for these, and you have no interest in them? A. No, we were not paid. We have no interest. But the Spanish Government repaid it indirectly in many ways.

* * * * *

Q. Let me return briefly to the Spanish Symphony, that motion picture that you said you were trying to sell to TWA. A. Yes, sir.

Q. Was part of the purchase price that they forgive some traveling expenses for you and your family which you owed to TWA? A. No, sir.

Q. That was not to be part of the purchase price, is that right? A. The company owes money to TWA, not myself.

Q. What does the company owe money to TWA for? A. For transportation.

Q. For whom? A. Samuel Bronston Productions.

Q. Well, who traveled, you? A. The books would reveal—maybe I traveled, too.

Q. Your wife? A. My wife always travels with me. This was my understanding with Mr. duPont. Wherever I go, my wife goes with me.

Q. And the company pays for her travel, too? A. Yes, sir.

Q. Do you have any children? A. Yes.

Q. Do they travel with you, too? A. Sometimes, and I pay for it.

Q. Are their travel expenses also included in the bill to TWA? A. I don't know.

Q. Did the company pay it— A. I doubt very much.

Q. Did the company pay the traveling expenses of your children? A. If the company paid, they advanced for my account.

Q. And was that likewise paid back by deducting from your salary? A. Yes, sir.

8. The aforesaid testimony of Samuel Bronston, the defendant, as he then and there well knew, was untrue in that the Spanish Government did not own the aforesaid

film "Sinfonia Espanola" and Samuel Bronston, the defendant, and companies in which he had an interest did own and have an interest in the said film.

(Title 18, United States Code, Section 1621)

ROBERT M. MORGENTHAU
United States Attorney

WILLIAM DEAN THEALL
Foreman

10/2/69

Warrant of court ordered. Murphy, J.

Oct 7th 1969, Bench Warrant vacated. Deft. appears voluntarily. Pleads not guilty. Adj. to 11/13/69 for motion. Deft. Ordered fingerprinted—Released custody of his atty.

COOPER, J.

Opinion of the United States Court of Appeals for the Second Circuit included on pages 1-15 of the printed Appendix to the Petition for a Writ of Certiorari.

United States Court of Appeals

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the tenth day of December one thousand nine hundred and seventy-one.

Present: Hon. J. Edward Lumbard
Hon. Walter R. Mansfield
Hon. James L. Oakes
Circuit Judges.

The United States of America

Plaintiff-Appellee,

v.

Samuel Bronston,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro
Clerk

Supreme Court of the United States

No. 71-1011 xxOctoberTermxxx

Samuel Bronston,

Petitioner,

v.

United States

ORDER ALLOWING CERTIORARI. Filed April 17, ---------- , 1972.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second ---------- Circuit is granted.

ILE COPY

Supreme Court U.S.
FILED
FEB 7 1972
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1011

SAMUEL BRONSTON,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SHELDON H. ELSEN,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. .....

SAMUEL BRONSTON,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Samuel Bronston petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case, entered on December 10, 1971.

Opinion Below

The opinion of the Court of Appeals (App. A., pp. A1-A15 *infra*) is not yet reported.

Jurisdiction

The judgment of the Court of Appeals was entered on December 10, 1971. On January 3, 1972, Mr. Justice

Marshall extended the time for filing a petition for a writ of certiorari to and including February 8, 1972.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Whether a perjury conviction may be based on true answers by the witness.

2. Whether a perjury conviction may be based on ambiguous questions.

3. The amount and quality of proof needed to sustain a conviction of perjury based on ambiguous questions about events that were several years old, and to which the answers of the witness were true.

Statute Involved

18 U.S.C. § 1621 is set forth in Appendix B.

Statement

Petitioner Samuel Bronston ("Mr. Bronston") was examined under § 21(a) of the Bankruptcy Act, in a Chapter XI arrangement proceeding relating to the assets of a corporation of which he was the president and sole stockholder. In the course of that examination he was asked the following questions and gave the following answers:

> "Q. Do you have any bank accounts in Swiss banks, Mr. Bronston? A. No, sir.
>
> Q. Have you ever? A. The company had an account there for about six months, in Zurich.
>
> Q. Have you any nominees who have bank accounts in Swiss banks? A. No, sir.
>
> Q. Have you ever? A. No, sir."

The Government did not dispute the truthfulness of any of these answers. Mr. Bronston had had a personal bank account in Geneva, and the prosecution proceeded on the theory that he committed perjury by not saying so in answer to the second question.

It was undisputed that the Geneva account had been dormant for four years and had been closed two years before the § 21(a) examination. It was also undisputed that there were no assets in the account at the time of the questioning, and that the account was known to the Government because Mr. Bronston had given a waiver of Swiss bank secrecy to his creditors, one of whom used the waiver to obtain the records of the account and turned them over to the prosecuting authorities.

Reasons for Granting the Writ

I. The Issue of Whether Perjury Can Be Based on True Testimony Is a Fundamental One, Upon Which the Circuits Are Divided and Upon Which the Second Circuit Divided in the Instant Case.

By a 2-1 majority, Judge J. Edward Lumbard dissenting, the Court of Appeals for the Second Circuit has affirmed petitioner's judgment of conviction in the United States District Court for the Southern District of New York, entered on one count of a two-count indictment, charging petitioner with perjury, in violation of 18 U.S.C. § 1621. The basic issue raised here, upon which the Circuit Court divided, involves a fundamental question in the construction of the Federal perjury statute. On this point the Circuits are divided, the Sixth and Third Circuits agreeing with the dissent in the Second Circuit. *Galanos* v. *United States*, 49 F.2d 898 (6th Cir. 1931); *United States* v. *Slutzky*, 79 F.2d 504 (3d Cir. 1935); and *United States* v. *Wall*, 371 F.2d 398 (6th Cir. 1967).

The issue was well stated by Judge Lumbard in his dissent below:

> "The issue is not 'whether an answer under oath, which is true—but only half true—can constitute perjury under 18 U.S.C. § 1621,' for this phraseology intimates that Bronston's answer was somehow half false, and even the majority cannot help but recognize that 'it was never disputed that Bronston's company had had an account in Zurich for six months. . . .' I think the issue is better stated as whether a perjury conviction can stand when the defendant's answer to a question under oath is literally truthful but unresponsive. I further think the answer is that it cannot, even if the defendant's answer is motivated by a willful attempt to conceal some material fact."
>
> • • •
>
> "• • • the majority affirms today notwithstanding the unchallenged accuracy of Bronston's statement, unequivocal case law, and the clear words of the perjury statute requiring for conviction that a person under oath willfully state 'any material matter which he does not believe to be true.'" (A10-A11)

He went on to state:

> "• • • I believe that once testimony is found truthful there can be no perjury conviction as a matter of law, and the jury is not entitled to consider whether the defendant hoped that a truthful answer would be interpreted in any particular way. Whether Bronston's answer was calculated to mislead the questioner and frustrate the bankruptcy proceedings should not here concern us. We should inquire into his state of mind only to determine whether or not he believed in the truthfulness of his answer.
>
> The confusion betrayed by the majority may well result from a misperception of several cases which Bronston cites." (A11-A12)

The decision below conflicted with decisions in the Sixth and Third Circuits. Judge Lumbard said:

> "In *Galanos* v. *United States,* 49 F.2d 898 (6th Cir. 1931), the defendant was asked 'Don't you remember . . . that you made arrangements yourself for the making of a bond?' He replied he did not, frustrating an attempt to prove his association with the party in need of the bond. His conviction for perjury was reversed, the court noting that, although he participated in negotiations leading to the making of the bond, he was entitled to consider the question as an inquiry whether he *himself* had procured the bond, and that his negative answer was consequently true.
>
> "The nature and scope of the question was also involved in *United States* v. *Slutzky,* 79 F.2d 504 (3rd Cir. 1935). The defendant was asked whether he had ever been convicted of a felony, and his negative response was found literally accurate because New Jersey, where he had been convicted of crime, did not classify any crimes as felonies. Thus his perjury conviction was overturned.
>
> "In *United States* v. *Wall,* 371 F.2d 398 (6th Cir. 1967), an interpretation of the question also decided whether the defendant's answer was truthful. The defendant responded negatively to the question 'Have you ever been on trips with Mr. X?' The government admitted that the question could be construed as asking either whether the defendant had ever accompanied Mr. X on a trip, or whether she had ever been on a trip at a particular place at the same time as Mr. X. Thus, although she and Mr. X had been in Florida together, the perjury conviction was reversed because there was no evidence to establish the falsity of her answer with respect to the first interpretation." (A12)

II. The Questioning Was Too Ambiguous to Form a Fair Basis for a Charge of Perjury.*

Mr. Bronston was being examined about the assets of a company in Chapter XI. Since he was the president and sole stockholder of that company, his own assets could also come into question. After being asked many questions about both the company's assets and his own, the questions in issue were asked. Then the following questions were asked and the following answers were given:

> "Q. Do you have a bank account in Rome at the Banco Commerciale? A. No, sir, I don't have it any more.
>
> Q. Did you at one time? A. We had it there during the period of production of John Paul Jones.
>
> Q. Who is 'we,' the company? A. We made a picture called John Paul Jones.
>
> Q. I know, but was it the company that had the bank account? A. It started with me and then it switched to the company." (E5-E6)**

The word "you" can refer to either a company or an individual. For example, an officer of General Motors, if examined, could be asked: "How many cars did you manufacture in June", referring to the company, or "How long have you been driving", referring to the individual.

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* It is important to note that this is a wholly separate argument from the question referred to in Point I, though both issues are involved in much of the case law. As Judge Lumbard pointed out when he joined the majority on the issue of ambiguity but maintained his dissent on the issue of truthfulness: "Bronston argues that the question he faced was also ambiguous and that his answer was a truthful response to one interpretation. We should not let this argument obscure the fact that his response was truthful regardless of which interpretation of the . . . question is adopted." (A12-A13)

** The record reference is to pages of the joint appendix of exhibits which was filed with the Court of Appeals.

If he were asked "Have you ever had any Swiss bank accounts", the question could refer to either company accounts or personal accounts.

The lawyer examining Mr. Bronston* never made clear the nature of the account about which he was asking. The answer "The company had an account there for about six months, in Zurich" was not only true but took a step to clarify the ambiguity in the questioning. If the questioner wanted to know about personal accounts after such an answer he need only have said so. He did not. To charge the witness with perjury under such circumstances was unfair and such a conviction should not be permitted to stand.

United States v. *Wall,* 371 F.2d 398 (6th Cir. 1967), held that in a situation of this sort, where the question could mean either one of two things, a perjury conviction could not be sustained as a matter of law if the proof simply established a contradiction with one of two meanings.

In *Wall,* the court's description of the charges was:

> "The indictment charged that she testified falsely before the grand jury as follows:
>
> 'Q. Have you ever been on trips with Mr. X? A. I have not.'
>
> "The indictment further alleged:
>
> 'The aforesaid testimony of defendant Loretta Wall, as she then and there well knew, was not true, in that she had been on a trip with Mr. X in Miami Beach, Florida, from February 14, 1964 through February 20, 1964.' "

The opinion went on to point out that the words "by a trip—on a trip", as defined by the Assistant United States

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* The examination was by a lawyer for a creditor, not by the Referee in Bankruptcy.

Attorney, "can mean either one of two things: That a person accompanied somebody else travelling with, or it can mean that they were there at a particular place with a person." The court noted that the evidence might have shown that under one of the interpretations the answer was false, but not under the other. It then went on to hold:

> "The trouble with this case is that the question upon which the perjury charge was based, was inarticulately phrased, and, as admitted by the prosecution, was susceptible of two different interpretations.
>
> "In our opinion, no charge of perjury can be based upon an answer to such a question."
>
> • • •
>
> "This must be so because the essence of the crime of perjury as defined in the statute is the belief of the witness concerning the veracity of his testimony. United States v. Winter, 348 F.2d 204 (2d Cir. 1965), cert. denied 382 U.S. 955, 86 S.Ct. 429, 15 L.Ed.2d 360. In a case where the question propounded admits of several plausible meanings, the defendant's belief cannot be adequately tested and it is necessary to determine what the question meant to him when he gave the disputed answer." 371 F.2d at 399-400.

See also *United States* v. *Lattimore,* 127 F. Supp. 405 (D.C.D.C. 1955), *aff'd,* 232 F.2d 334 (D.C. Cir. 1955); *Galanos* v. *United States,* 49 F.2d 898 (6th Cir. 1931).

The Second Circuit's decision in this case exposes a witness to a charge of perjury where the fault, if any, lies with the questioner. This Court should adopt the Sixth and Third Circuit rule, which is applicable to the facts of the instant case, and reverse.

III. Perjury Was Not Shown on the Whole Record.

While we will not burden this Court with a detailed discussion here of the sufficiency of the evidence, we should point out that not only was perjury not shown on the face of the 21(a) examination but the Government's proof was essentially confined to an officer of the Geneva bank, testifying with petitioner's consent, who identified the records of the Geneva account. Not only were the petitioner's answers at the 21(a) examination conceded to be true, but the Government did not dispute the facts that the account had been closed for two years, dormant for four, was without assets, and had been disclosed by the petitioner himself.

Where answers are true no inference may be drawn from proof of objective falsity that the accused knew his statements to be false. *Cf. United States* v. *Sweig,* 441 F.2d 114, 117 (2d Cir. 1971), *cert. denied* 403 U.S. 932 (1971). Here, moreover, the events to be recalled were old, so that more proof was needed to show perjury than the existence of the account, *Fotie* v. *United States,* 137 F.2d 831 (8th Cir. 1943), which was all that the Government proved. It was significant that the account was without assets, cf. *United States* v. *Mousley,* 201 F. Supp. 510 (E.D. Pa. 1962), *aff'd without opinion,* 311 F.2d 795 (3d Cir. 1963), *cert. denied* 372 U.S. 966, and that it was disclosed by the defendant himself, by his waiver of bank secrecy, *cf. United States* v. *Rose,* 215 F.2d 617, 623-4 (3d Cir. 1954).

The perjury statute should not be construed to permit conviction—for making truthful answers—on such a record as this.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York, February 4, 1972.

Respectfully submitted,

SHELDON H. ELSEN,
Attorney for Petitioner,
10 East 40th Street,
New York, New York 10016.

LEWIS SHAPIRO,
JOHN S. MARTIN, JR.,
Of Counsel.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 199—September Term, 1971.

(Argued September 28, 1971 Decided December 10, 1971.)

Docket No. 71-1533

UNITED STATES OF AMERICA,

Appellee,

v.

SAMUEL BRONSTON,

Defendant-Appellant.

Before:

LUMBARD, MANSFIELD and OAKES,

Circuit Judges.

Appeal from a judgment of conviction after jury trial in the United States District Court for the Southern District of New York, Charles H. Tenney, *Judge*, of perjury in violation of 18 U.S.C. §1621.

Affirmed.

SHELDON H. ELSEN, Orans, Elsen & Polstein, New York, New York (Lewis Shapiro, John S. Martin, Jr., of counsel), *for Appellant.*

WALTER M. PHILLIPS, JR., Assistant United States Attorney (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, Harold F. McGuire, Jr., Assistant United States Attorney, of counsel), *for Appellee.*

OAKES, *Circuit Judge:*

Appellant Samuel Bronston was convicted on February 2, 1971, by a jury in the United States District Court for the Southern District of New York, Judge Charles H. Tenney presiding, on one count of perjury in violation of 18 U.S.C. §1621[1] which arose from his allegedly false testimony before a referee in an 11 U.S.C. §44(a) bankruptcy examination. Judge Tenney, in a thorough but unreported memorandum opinion dated April 15, 1971, denied appellant's motion for acquittal or, alternatively, a new trial, and on April 21, 1971, sentenced him to six months' probation and a $2,000 fine. We affirm the conviction.

Appellant was the president and sole owner of Samuel Bronston Productions, Inc., which between 1958 and 1964, by itself or through seventeen affiliated companies, produced a large number of motion picture spectaculars, including "El Cid," "Circus World" and "The Fall of the Roman Empire." With business offices scattered throughout the world, and with investment per movie as high as

---

1 18 U.S.C. §1621 reads in pertinent part:

> Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify . . . truly, . . . willfully and contrary to such oath states . . . any material matter which he does not believe to be true, is guilty of perjury. . . .

Mr. Bronston was acquitted by the jury of the second of the two perjury counts charged against him.

$17 million, the Bronston companies had accounts in numerous banks in several countries; in 1962, for instance, there were 37 accounts in five countries. As president of the principal company bearing his name, Bronston personally supervised virtually all of the transactions involving each of those accounts.

In June 1964, following the withdrawal of support by a principal financier earlier in the year, Samuel Bronston Productions, Inc., petitioned for an arrangement with its creditors pursuant to Chapter XI of the Bankruptcy Act, 11 U.S.C. §701 *et seq.* A Section 21(a) hearing was held on June 10, 1966, before an appointed referee, to determine the existence and location of the company's assets for the benefit of its creditors.

Samuel Bronston, while under oath at the hearing, responded as follows to questions regarding bank accounts in Switzerland:

> Q. Do you have any bank accounts in Swiss banks, Mr. Bronston? A. No, sir.
>
> Q. Have you ever? A. The company had an account there for about six months, in Zurich.
>
> Q. Have you any nominees who have bank accounts in Swiss banks? A. No, sir.
>
> Q. Have you ever? A. No, sir.

It was this colloquy which formed the basis of the Government's perjury charge against appellant. At the trial the Government produced two witnesses who testified and introduced documents showing that in October 1959 Bronston had opened an account in his own name at the International Credit Bank in Geneva, Switzerland. Under Swiss law, the account was secret, although it was not a numbered account. The account was active from its opening until 1962, when it became dormant; it was closed in

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1964. During its period of activity, checks drawn on the account totalled over $100,000; some of the transfers from the account were made to Samuel Bronston Productions, Inc.

Appellant did not testify at his trial, and the thrust of his witnesses' testimony was that the account was no secret, since in 1965 Bronston had executed a waiver of secrecy for the benefit of all creditors in respect to all Swiss banks. Nevertheless, while it was never disputed that Bronston's company had had an account in Zurich for six months, the Government proved to the satisfaction of the jury that Bronston intentionally had not told the whole truth at the hearing regarding his Swiss bank accounts.

The questions posed by this appeal are whether an answer under oath, which is true—but only half true—can constitute perjury under 18 U.S.C. §1621; and whether the evidence against Bronston is sufficient to sustain his conviction. Materiality has been conceded.

Bronston's principal arguments center on the question asked him, which was the basis of the indictment, "Have you ever [had any bank accounts in Swiss banks]?" First, he contends that the word "you" made the question ambiguous so that he could not understand whether the question referred to him personally or to his companies; he urges that a question of such imprecision cannot support a conviction for perjury. Second, appellant argues that, whether or not the question was ambiguous, the Government failed to prove that he remembered the account at the time of the examination, and since his response regarding the Zurich account was true, there was not a sufficient evidentiary basis for the jury's finding that Bronston intentionally had given false testimony in the bankruptcy proceeding.

A crucial element of the crime of perjury is the belief of the defendant concerning the verity of his sworn testimony.

United States v. *Winter*, 348 F.2d 204, 210 (2d Cir.), *cert. denied*, 382 U.S. 955 (1965). In order to support a perjury conviction, the question asked must be of such clarity that it is capable of eliciting an answer which the defendant knows to be false; that is, it must adequately test the defendant's belief in the truthfulness of his answer. *United States* v. *Wall*, 371 F.2d 398, 400 (6th Cir. 1967). Accordingly, a defendant may not lawfully be convicted of perjury where, under oath, he gives an answer which is "literally accurate, technically responsive, or legally truthful." *Blumenfeld* v. *United States*, 306 F.2d 892, 897 (8th Cir. 1962); *Smith* v. *United States*, 169 F.2d 118, 121 (6th Cir. 1948); *Hart* v. *United States*, 131 F.2d 59, 61 (9th Cir. 1942); *United States* v. *Slutzky*, 79 F.2d 504, 505 (3rd Cir. 1935); *Galanos* v. *United States*, 49 F.2d 898, 899 (6th Cir. 1931).

Here, Bronston would have us rule that the question upon which his conviction is predicated was misleading, imprecise and suggestive of various interpretations, thus making it incapable of supporting the conviction. To the contrary, we believe that the question was readily susceptible of a responsive reply and that it adequately tested the defendant's belief in the veracity of his answer.

The principal question was preceded by the question, "Do you have any bank accounts in Swiss banks, Mr. Bronston?" The "you" in "Have you ever?" could in the singular refer only to Mr. Bronston, or in the plural to Mr. Bronston personally and the company, there being no plausible suggestion that in the next question the examiner had shifted from inquiring about Bronston's personal accounts to those solely of his company. By answering in reference to "the company" Bronston indicated his understanding that "you" included, or meant only, the personal you; otherwise, he would not have distinguished his answer by prefacing it with "the company."

Thus, this is not the *Wall*[2] case, where the question was "susceptible of two different interpretations," under one of which the answer might have been truthful. Nor is it the *Galanos*[3] case, where the question was precise and the answer similarly precise, literally true and wholly responsive to the exact inquiry. Here the question unambiguously asked Bronston simply to state whether he had ever had a Swiss bank account. Yet Bronston answered that "[t]he company" had had an account in Zurich for six months. While that much of the answer was literally true, the jury was entitled to find that the answer as given was intended to represent that Bronston personally did not have such an account.

Bronston contends, however, that the truth in the half-truth response takes his answer out of the realm of perjury, citing *United States* v. *Slutzky, supra*, and *United States*

---

2 *United States* v. *Wall*, 371 F.2d 398, 400 (6th Cir. 1967). There the basis of the conviction was the defendant's response to the question, "Have you ever been on trips with Mr. X?" On defendant's motion for a bill of particulars the Assistant United States Attorney acknowledged that "on a trip" "can mean either one of two things: That a person accompanied somebody else traveling with, or it can mean that they were at a particular place with, a person." The difference between *Wall* and Bronston's interpretation of "you" is apparent.

3 *Galanos* v. *United States*, 49 F.2d 898 (6th Cir. 1931). There the defendant responded truthfully to a question which was ultimately, from the Government's angle, so precise as to be imprecise. When asked whether "you had made the arrangements yourself," defendant replied negatively. In fact, an accomplice had made the arrangements. The Sixth Circuit overturned defendant's conviction for perjury, reciting the following language which appellant would have us apply to his situation:

> . . . [H]is negative answer was literally true. Clearly he cannot be convicted of perjury merely because his literally accurate answer might have been somewhat modified in effect if he had been asked to state all the circumstances. Perhaps, if he had been asked specifically, he would have answered truly.
>
> 49 F.2d at 899.

Here, had further testimony as to the company's account been elicited, the creditors would still have been in the dark about Bronston's personal account.

v. *Cobert*, 227 F. Supp. 915 (S.D.Cal. 1964). But under analysis, those cases do not aid him.

In *Slutzky* the defendant was asked whether he had ever been convicted of a felony in a certain jurisdiction. His answer was a truthful and responsive "no," since in that jurisdiction there was no classification of crimes into felonies and misdemeanors. *Cobert* is also unlike the present case, for there a defendant was charged with perjury for answering a question relative to a "listing post" when it did not appear from common knowledge or in the indictment that he understood the phrase "listing post." The questions posed to Bronston, however, were too plain to be construed as referring solely to the company; his nonresponsive answer very clearly indicated his comprehension of what was called for by the question.

For the purposes of 18 U.S.C. §1621, an answer containing half of the truth which also constitutes a lie by negative implication, when the answer is intentionally given in place of the responsive answer called for by a proper question, is perjury. *See, e.g., United States* v. *Rao*, 394 F.2d 354, 356-57 (2d Cir.), *cert. denied*, 393 U.S. 845 (1968). This must be so especially in the context of a Section 21(a) examination, which by its nature is a searching expedition, where the witnesses are the only parties who know the truth and are able to divulge it. "The general purpose of the statute [11 U.S.C. §44(a)] is to provide a method for a searching inquiry into the condition of the estate of the bankrupt, to assist in discovering and collecting the assets, and to develop facts and circumstances which bear upon the question of discharge." *Travis* v. *United States*, 123 F.2d 268, 271 (10th Cir. 1941); *see Cameron* v. *United States*, 231 U.S. 710, 717 (1914); *Sigman* v. *United States*, 320 F.2d 176, 177-78 (9th Cir. 1963), *cert. denied*, 375 U.S. 967 (1964). A half-truth containing a lie, interjected by a

knowledgeable and interested witness, may result in sidetracking the person inquiring into the existence of assets known only to the bankrupt. Or it may persuade the interrogator to proceed on another line of questioning. See *United States* v. *Stone*, 429 F.2d 138, 140-41 (2d Cir. 1970). Either consequence is contrary to the "whole truth" principle of the oath.[4] The question here was not from out of the blue or on a collateral matter. The Section 21(a) examination was for the very purpose—known to appellant—of eliciting the kind of information this question called for.

Since we cannot say as a matter of law that Bronston's half-truth answer to the question asked will not support his conviction, his appeal must fail unless we find a lack of evidence to support the jury's determination of guilt. Upon review, the evidence must be viewed in the light most favorable to the Government, and all permissible inferences will be drawn in its favor.

Appellant claims that there was an insufficient showing that he remembered his personal Swiss bank account and intentionally neglected to disclose it. Specifically, he argues that the account was dormant for four years before the question and was closed two years before, that it was only a small part of a large stream of widespread banking

4 The Bankruptcy Act and the orders thereunder do not specify a particular form of oath to be administered in bankruptcy proceedings, *compare* 11 U.S.C. §43, 44; Bankruptcy Gen. Order 22, 28 U.S.C. Under Gen. Order 22, the Federal Rules of Civil Procedure—insofar as they are not inconsistent with the Act and orders—govern the examination of witnesses, but the Federal Rules themselves do not contain the form of a designated oath. The forms used in bankruptcy procedures, however, speak in terms of truth according to the person's best knowledge [Bankruptcy Form 1, 28 U.S.C.] or truth and completeness to the best of his knowledge [Bankruptcy Form 3, 28 U.S.C.]. It may be deduced from these orders and forms and the purpose of the Act that an oath given in a bankruptcy proceeding basically takes the same form, and has the same legal consequences, as an oath composed of the traditional words of "truth, the whole truth, and nothing but the truth." *See* 6 J. Wigmore, Evidence §1818 (3d ed. 1940).

activity, and that in 1965 his creditors had received a waiver of bank secrecy which would have permitted them to locate the International Credit Bank account, so that, in effect, that account was no secret. The Government presented contradictory or qualifying evidence in reply.[5]

In short, the jury was presented with conflicting facts relative to Bronston's state of mind at the time he answered the bank account questions. While the defendant's knowledge of the falsity of his statements at the time he gave them is essential to a perjury conviction under 18 U.S.C. §1621, *United States* v. *Sweig*, 441 F.2d 114, 117 (2d Cir.), *cert. denied*, 403 U.S. 932 (1971); *United States* v. *Stone*, 429 F.2d 138, 140 (2d Cir. 1970); *La Placa* v. *United States*, 354 F.2d 56, 58 (1st Cir. 1965), *cert. denied*, 383 U.S. 927 (1966), absent an admission by the defendant, the only way that his knowledge can be determined is through circumstantial evidence. *American Communications Ass'n. CIO* v. *Douds*, 339 U.S. 382, 411 (1950); *United States* v. *Sweig, supra*. The kinds of circumstantial evidence which the jury properly may consider as reflecting the defendant's state of mind at the time of allegedly perjurious testimony are proof of the objective falsity itself, proof of a motive to lie, and other facts showing that the defendant knew more than he stated. *See United States* v. *Sweig, supra; United States* v. *Rao, supra; United States* v. *Jones*, 374 F.2d 414, 419 (2d Cir.), *cert. denied*, 389 U.S. 835 (1967).

Here the jury could have inferred that Bronston willfully gave false and evasive testimony from the conclu-

5 The jury could have been more impressed by the facts that the purported waiver of bank secrecy referred to all banks in Switzerland and listed seventeen company names under which an account could have been opened (creating the proverbial needle-in-the-haystack situation); and that one of Bronston's own corporate officers, who had prepared appellant's tax returns for several years in the early 1960's, testified on cross-examination to the effect that he did not know about the Geneva account at the time it was active.

sive proof of the existence of his personal Geneva bank account; from the motive that the principal officer and owner of a debtor corporation might want to conceal assets from the corporation's creditors; and from the unlikelihood that a businessman would forget a bank account that had the duration of this account, a $100,000-plus volume of transactions in it, and was of a secret nature. Thus, there having been sufficient evidence upon which the jury could have established guilt beyond a reasonable doubt, we affirm the conviction.

LUMBARD, *Circuit Judge* (dissenting):

I dissent.

The majority states the issue in this case in a manner which is unacceptable to me. The issue is not "whether an answer under oath, which is true—but only half true—can constitute perjury under 18 U.S.C. §1621," for this phraseology intimates that Bronston's answer was somehow half false, and even the majority cannot help but recognize that "it was never disputed that Bronston's company had had an account in Zurich for six months. . . ." I think the issue is better stated as whether a perjury conviction can stand when the defendant's answer to a question under oath is literally truthful but unresponsive. I further think the answer is that it cannot, even if the defendant's answer is motivated by a willful attempt to conceal some material fact.

During a section 21(a) hearing under Chapter XI of the Bankruptcy Act Bronston was asked by the referee, "Do you have any bank accounts in Swiss banks, Mr. Bronston?" He responded in the negative. The next question was "Have you ever?" and Bronston replied, "The company had an account there for about six months, in Zurich." For this reply he has been convicted of perjury,

and the majority affirms today notwithstanding the unchallenged accuracy of Bronston's statement, unequivocal case law, and the clear words of the perjury statute requiring for conviction that a person under oath willfully state "any material matter which he does not believe to be true."[1]

The majority acknowledges that "A crucial element of the crime of perjury is the belief of the defendant concerning the verity of his sworn testimony [citation omitted]," that "In order to support a perjury conviction, the question asked must be . . . capable of eliciting an answer which the defendant knows to be false [citation omitted]," and that "the defendant's knowledge of the falsity of his statements at the time he gave them is essential to a perjury conviction under 18 U.S.C. §1621 [citation omitted]." Yet in face of these clear statements of the law and the equally clear wording of the statute the majority finds that, while Bronston's answer was truthful, "the jury was entitled to find that the answer as given was intended to represent that Bronston personally did not have such an account."

On the contrary, I believe that once testimony is found truthful there can be no perjury conviction as a matter of law, and the jury is not entitled to consider whether the defendant hoped that a truthful answer would be interpreted in any particular way. Whether Bronston's answer was calculated to mislead the questioner and frustrate the bankruptcy proceedings should not here concern us. We should inquire into his state of mind only to determine whether or not he believed in the truthfulness of his answer.

1 Section 1621 reads, in pertinent part:

> Whoever, having taken an oath before a competent tribunal, officer, or person . . . that he will testify truly . . . willfully and contrary to such oath states . . . any material matter which he does not believe to be true, is guilty of perjury . . .

The confusion betrayed by the majority may well result from a misperception of several cases which Bronston cites.

In *Galanos* v. *United States*, 49 F.2d 898 (6th Cir. 1931), the defendant was asked "Don't you remember . . . that you made arrangements yourself for the making of a bond?" He replied he did not, frustrating an attempt to prove his association with the party in need of the bond. His conviction for perjury was reversed, the court noting that, although he participated in negotiations leading to the making of the bond, he was entitled to consider the question as an inquiry whether he *himself* had procured the bond, and that his negative answer was consequently true.

The nature and scope of the question was also involved in *United States* v. *Slutzky*, 79 F.2d 504 (3rd Cir. 1935). The defendant was asked whether he had ever been convicted of a felony, and his negative response was found literally accurate because New Jersey, where he had been convicted of crime, did not classify any crimes as felonies. Thus his perjury conviction was overturned.

In *United States* v. *Wall*, 371 F.2d 398 (6th Cir. 1967), an interpretation of the question also decided whether the defendant's answer was truthful. The defendant responded negatively to the question "Have you ever been on trips with Mr. X?" The government admitted that the question could be construed as asking either whether the defendant had ever accompanied Mr. X on a trip, or whether she had ever been on a trip at a particular place at the same time as Mr. X. Thus, although she and Mr. X had been in Florida together, the perjury conviction was reversed because there was no evidence to establish the falsity of her answer with respect to the first interpretation.

These cases have in common the fact that the truthfulness of the defendant's answer turns on the scope or interpretation of the crucial question. Bronston argues that the

question he faced was also ambiguous, and that his answer was a truthful response to one interpretation. We should not let this argument obscure the fact that his response was truthful regardless of which interpretation of the referee's question is adopted.[2]

Because I agree with the majority that the question put to Bronston was unambiguous, I likewise agree that the above cases are correctly distinguished—but only insofar as they deal with ambiguous questions.[3] Insofar as they state the law upon a finding that the defendant's testimony was truthful, they call for reversal of Bronston's conviction. Although the majority would dismiss *Wall* because there the question was found ambiguous,[4] *Wall* also said that a defendant cannot lawfully be convicted of perjury when his answer is literally accurate, 371 F.2d at 400. *Galanos* cannot be distinguished because the defendant's answer was, in the majority's words, "precise, literally true and

2 To the interpretation we reject ("Have you, meaning the company, ever had an account in Swiss banks?"), Bronston's answer was truthful. To the only permissible interpretation ("Have you personally ever had such an account?"), his answer was also true—but not responsive to the question.

3 In these cases the issue was, as it must be under the statute, whether the defendant had told the truth. This in turn depended in large measure on a reading of the original question. If a certain interpretation was permissible, the defendant had told the truth. If not, he had lied. But here a determination of the meaning or scope of the question will not settle the issue of whether Bronston lied, since Bronston's answer was not responsive to the question.

4 In *Wall* the question put to the defendant was found by the appellate court susceptible to two interpretations, and the conviction was reversed. The contrapositive position, that in our case because the question was clear the conviction must stand, is untenable. The logic to this approach would be impeccable if indeed Bronston had *lied* to a question found capable of only one interpretation. But, however purposefully evasive Bronston may have been, his response was literally truthful. Were we to focus on cases dealing with ambiguous questions the true analogy would be to a case where a question was found susceptible to two interpretations and the defendant's answer was responsive to neither.

wholly responsive," [5] for Bronston's answer was also literally true, and precision and responsiveness are not relevant to the crime of perjury.[6] *Galanos* said unequivocally that the defendant clearly "cannot be convicted of perjury merely because his literally accurate answer might have been somewhat modified in effect if he had been asked to state all the circumstances." 49 F.2d at 899. *Slutzky* cannot be disregarded, as the majority would do, because the defendant's answer was "truthful and responsive" and Bronston's "non-responsive." *Slutzky* said "If the defendant's answers to questions were legally truthful, he cannot be held for perjury." 79 F.2d at 505. A truthful answer, even if not responsive to the question asked, is not perjury under §1621.[7]

Suppose, in response to the question "Have you ever [had any bank accounts in Swiss banks]?" Bronston had truthfully replied, "My daughter attended school in Switzerland." Had the questioning stopped there, could Bronston lawfully be convicted of perjury? Could he be found

---

5 *Galanos* required only that the defendant's answer be literally true, and never even used the words "precise" and "responsive."

6 In footnote 3 of the majority opinion, our case is apparently further distinguished from *Galanos* because "had further testimony as to the company's account been elicited, the creditors would still have been in the dark about Bronston's personal account." As pointed out in the text *infra*, the success or failure of the defendant's effort to sidetrack a particular inquiry has no bearing on whether or not his testimony was perjurious.

7 The majority also would distinguish *United States* v. *Cobert*, 227 F. Supp. 915 (S.D. Calif. 1964) because there the question was vague. The court also said, however, that "where it is clear from the face of the indictment that the defendant has not answered the question asked, he can hardly be held to have answered it falsely, and no assignment of perjury can be sustained." The court further noted that the defendant's answer was "nonresponsive at worst, and in no way shown that he committed prejury." 227 F. Supp. at 919. That Bronston's nonresponsive answer was perhaps not a product of misunderstanding makes no difference. A deliberate failure to respond is no more culpable than a failure prompted by confusion, especially when the answer given was concededly truthful.

willfully to have stated any material matter which he did not believe to be true?

That his actual answer was less obviously unrelated to the question, and therefore perhaps more likely to deceive, is irrelevant because the crime turns not upon whether he successfully deflected a more precise question but upon whether he believed in the truthfulness of his testimony. It may be that this puts a burden on the questioner to recognize when he is being led astray, but I prefer to insist upon the questioner's acuity than to distort the statute. Had the referee here noticed that Bronston's answer was unresponsive and questioned him with particularity about his personal accounts, and had Bronston thereupon answered responsively, I suspect that no one would think his original unresponsive answer perjurious. Bronston's conviction should in no degree depend on the referee's failure to notice he was being diverted.

APPENDIX B

§ 1621. Perjury generally

Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States. June 25, 1948, c. 645, 62 Stat. 733; Oct. 3, 1964, Pub.L. 88-619, § 1, 78 Stat. 995.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1011

SAMUEL BRONSTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, the president and sole owner of a motion picture production corporation which petitioned for an arrangement with its creditors pursuant to Chapter XI of the Bankruptcy Act (11 U.S.C. 701 *et seq.*), was convicted after a jury trial in the Southern District of New York on one count of perjury arising from testimony which he gave before the referee appointed to hold hearings to determine the existence and location of the corporation's assets for

the benefit of its creditors. He was sentenced to six months' probation and fined $2,000. The court of appeals affirmed, one judge dissenting (Pet. App. A).

The conviction was based upon the following questions and answers given by petitioner in the bankruptcy proceedings (Pet. App. A3):

Q. Do you have any bank accounts in Swiss banks, Mr. Bronston?
A. No, sir.
Q. Have you ever?
A. The company had an account there for about six months, in Zurich.
Q. Have you any nominees who have bank accounts in Swiss banks?
A. No, sir.
Q. Have you ever?
A. No, sir.

The undisputed evidence showed that for a two-and-one-half year period between October 1959 and February 1962, petitioner had had a personal account in a bank in Geneva, Switzerland, into which he made deposits and upon which he drew checks totalling over $100,000.

Petitioner contends: (1) that there was insufficient evidence, on the record as a whole, of willful perjury; (2) that the question to which there was the perjurious response was too ambiguous—in that "you" could have referred to him personally or to the company he controlled—to provide a basis for a perjury charge; and (3) that his answer that the company had had a Zurich account—because it was "literally" truthful—cannot properly be characterized as

perjurious. His first two contentions were rejected by the majority and the second also by the dissent below, and we rely here upon the reasons there given (as to the first contention, see Pet. App. A9-A10; as to the second contention, see A5-A6, A13). As for petitioner's third contention, that his response was literally true, we submit that his answer cannot correctly be so characterized. To the contrary, the answer constituted a representation that the only Swiss bank account he had was the company account in Zurich, and hence was a false denial of the existence of his personal account in Geneva.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MARCH 1972.

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IN THE

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No. 71-1011

SAMUEL BRONSTON,

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v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

Opinion Below

The opinion of the Court of Appeals is reported at 453 F.2d 555.*

* The opinion of the Court of Appeals is printed on pages 1-15 of the printed appendix to the petition for a writ of certiorari.

Jurisdiction

The judgment of the Court of Appeals was entered on December 10, 1971 (A10).* The petition for certiorari was filed on February 7, 1972 and granted on April 17, 1972.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Whether a perjury conviction may be based on true answers by the witness.

2. Whether a perjury conviction may be based on ambiguous questions.

3. The amount and quality of proof needed to sustain a conviction of perjury based on ambiguous questions about events that were several years old, and to which the answers of the witness were true.

Statute Involved

§ 1621. Perjury generally

Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or cer-

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* References prefixed by "A" are to the appendix and by "PA" to the petitioner's appendix filed at the back of this brief. The prefix "R" refers to the certified record from the Second Circuit. References to the trial record are also prefixed by "Tr. T."; exhibits are identified by their trial exhibit numbers. An appendix of trial exhibits has also been certified to this Court (R. 27).

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tificate by him subscribed, is true, wilfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States. June 25, 1948, c. 645, 62 Stat. 733; Oct. 3, 1964, Pub.L. 88-619, § 1, 78 Stat. 995.

Statement

Petitioner Samuel Bronston ("Mr. Bronston") was examined under § 21(a) of the Bankruptcy Act, in a Chapter XI arrangement proceeding relating to the assets of a corporation of which he was the president and sole stockholder. In the course of that examination a creditor's lawyer asked him the following questions and he gave the following answers:

"Q. Do you have any bank accounts in Swiss banks, Mr. Bronston? A. No, sir.

Q. Have you ever? A. The company had an account there for about six months, in Zurich.

Q. Have you any nominees who have bank accounts in Swiss banks? A. No, sir.

Q. Have you ever? A. No, sir." (PA 17).

The Government did not dispute the truthfulness of any of these answers. Mr. Bronston had had a personal bank account in Geneva, and the prosecution proceeded on the theory that he committed perjury by not saying so in answer to the second question.

It was undisputed that the Geneva account had been dormant for four years and had been closed two years before the § 21(a) examination, that there were no assets in

the account at the time of the questioning, that the account was not numbered but in petitioner's name and that he had signed checks on it for public use. (R 27, Govt. Exhs. 6, 7; R 35, 1/27/71 Tr. T. 62-63, 65). It was also undisputed that the account was known to the Government because Mr. Bronston had given a waiver of Swiss bank secrecy to his creditors (R 27, Deft. Exh. B; R 35, 1/27/71 Tr. T. 69, 71), one of whom used the waiver to obtain the records of the account and turned them over to the prosecuting authorities. (R 27, Deft. Exhs. A, C, D; R 35, 1/27/71 Tr. T. 69, 71, and 1/27/71 Tr. T. 75-77).

The indictment (A 4-9) contained a second unrelated account of perjury on which Mr. Bronston was acquitted. The jury voted to convict on Count 1, which charged that the above quoted answers constituted perjury, and a divided panel of the Second Circuit affirmed, with Circuit Judge J. Edward Lumbard dissenting. 453 F.2d 555.

Summary of Argument

It is undisputed that petitioner's statement about the company's account was true. If one assumes that the question "Have you ever" referred unambiguously to accounts held by the witness personally, and not by his company, the most that can be said is that the answer was unresponsive.

Thus the first issue presented here is whether it is necessary or desirable for the proper administration of justice that a truthful but unresponsive answer to a question be subject to the criminal sanctions of the perjury statute.

Since an unresponsive answer by a witness may so easily be remedied by the questioner's insistence that the witness give a responsive answer, there is no reason to invoke the drastic sanctions of the criminal law in these circumstances, when the answer is true. Moreover, since

law-abiding citizens who become witnesses in lawsuits or other proceedings are often reluctant to answer questions about their personal affairs or those of their relatives or friends, it would be extremely harsh to subject these individuals to criminal sanctions for giving an unresponsive answer. In addition, to make a felony of a truthful but unresponsive answer would create the possibility of widespread abuses and discriminatory application of the law. (See American Law Institute, Model Penal Code, §208.20, Comments (Tent. Draft No. 6, 1957), pp. 116-118, incorporated by reference in § 241.1 of the 1962 Proposed Official Draft.)

The test of objective truth, which places the burden on the questioner to be precise, has been followed by many cases in other Circuits, as well as by Judge Lumbard in his dissent below. *Galanos* v. *United States*, 49 F.2d 898 (6th Cir. 1931); *United States* v. *Slutzky*, 79 F.2d 504 (3d Cir. 1935); *United States* v. *Wall*, 371 F.2d 398 (6th Cir. 1967). Such a test should be adopted by this Court, and the conviction of petitioner should be reversed.

The crucial question asked of the witness, moreover, was ambiguous and his answer was responsive to one meaning. Ambiguity of the questioning raises the second issue. The 21(a) examination was about a company that was wholly owned by the witness. In the question, "Have you ever" the word "you" could have referred to the company or to the witness personally. To the former meaning the witness's answer was not only truthful but also responsive. Subsequent questions also showed confusion by the witness as to whether the questioner was asking about company bank accounts or his personal bank accounts, but the creditor's lawyer who was asking the questions made no effort to clarify the ambiguity. A perjury prosecution cannot be based on ambiguous questions. *United States* v. *Wall, supra; United States* v. *Lattimore,*

127 F. Supp. 405 (D.C.D.C. 1955), *aff'd* 232 F.2d 334 (D.C. Cir. 1955); *Galanos* v. *United States, supra.*

The third issue arises from an examination of the evidence at trial. Petitioner's personal Swiss bank account, which was in his name and on which he had publicly issued checks signed by him, had been dormant for four years and closed for two years at the time when the questions were asked. There were no assets in it. It had not been treated as a secret, had been opened to discount a commercial note, and petitioner had been willing to give a waiver of Swiss bank secrecy to his creditors some time before the questioning in issue here, through which records of the account were later obtained by a creditor. These facts show the harshness of permitting a conviction based on guesses as to whether the response was subjectively honest, despite its objective truthfulness. The evidence was insufficient to prove perjury under any test that can properly be given to a jury.

ARGUMENT

I. A Perjury Conviction May Not Be Based on True Testimony.

The witness was asked by a creditor's lawyer, in an arrangement proceeding relating to his wholly owned company, if "you" ever had a Swiss bank account. He answered truthfully: "The company had an account there for about six months, in Zurich." He personally had also had an account. The initial question is whether, assuming that "you" referred unambiguously to the witness personally, and that his answer was unresponsive, a perjury conviction may be based on a true answer which is unresponsive. (Whether the question was unambiguous and the answer thus unresponsive will be discussed in Point II, *infra.*)

It appears that the question has never been before this Court. An unbroken line of Circuit Court decisions, before this case, had held that a perjury conviction cannot be based on objectively truthful testimony. *Galanos* v. *United States, supra; United States* v. *Slutsky, supra; United States* v. *Wall, supra.* As Judge Lumbard put it in his dissent below:

> "• • • I believe that once testimony is found truthful there can be no perjury conviction as a matter of law, and the jury is not entitled to consider whether the defendant hoped that a truthful answer would be interpreted in any particular way. Whether Bronston's answer was calculated to mislead the questioner and frustrate the bankruptcy proceedings should not here concern us. We should inquire into his state of mind only to determine whether or not he believed in the truthfulness of his answer." 453 F.2d at 561.

The Sixth Circuit has said, in applying a test of objective truthfulness:

> "Clearly he cannot be convicted of perjury merely because his literally accurate answer might have been somewhat modified in effect if he had been asked to state all the circumstances. Perhaps, if he had been asked specifically, he would have answered truly." *Galanos* v. *United States,* 49 F.2d at 899.

And the Third Circuit has observed:

> "The questions put to him must search for the truth, • • •" *United States* v. *Slutzsky,* 79 F.2d at 505.

The problem presented by an unresponsive answer does not require the drastic sanction of a criminal prosecution for perjury. The cure for an unresponsive answer is to ask another question and to insist on a responsive answer. Where the aim is to develop a proper record, moreover, it

seems more reasonable to put such burden as there is on the lawyer who is asking the questions rather than on the layman who is to respond.

Here, the burden on the lawyer would have been slight. He need only have asked one more question, whether Mr. Bronston personally had had an account. Indeed, it was Mr. Bronston's company that was the party to the arrangement proceeding. He personally was not in any kind of bankruptcy proceeding. He was being asked questions by a lawyer for a creditor of the company, who had the right to ask Mr. Bronston about company affairs. The lawyer also had the right, if he wished, to ask about the personal affairs of Mr. Bronston, the sole stockholder. When the lawyer asked about the existence of Swiss bank accounts he received a truthful answer that the company in the arrangement had had one. If his interest went beyond company accounts, upon receiving an answer about the company, he need only have asked:

> "Have you personally ever had any Swiss bank accounts?"

At that point the witness would have had to answer about his personal accounts, absent a valid claim of privilege, immateriality or the like. Had he denied his personal account at that point the answer would have constituted perjury. But the lawyer did not ask that question and there is no evidence that if petitioner had been asked it he would have lied.

Witnesses are often reluctant to testify about their business affairs, their friends' lives, or other aspects of their private lives which they wish to avoid publicizing. The most law-abiding witness will often want to protect his privacy, and unless the questioner clearly wants to know about such matters he will normally not learn of them. Unresponsive answers are an everyday and common oc-

currence in our courts, our depositions and administrative proceedings. Often the questioner will accept the unresponsive answer, for a variety of reasons. His interest may shift, or he may decide to use a different line of inquiry, or he has what he wants, or he wants to avoid a dispute on relevance, privilege or the like. The witness often does not know why the lawyer fails to press him. Witnesses often do not even know whether their testimony was responsive; they may have misunderstood the question, or have been thinking ahead to another subject, or have expressed themselves poorly. They may be waiting for a precise question and trying to find how far they will be pressed for information. A rule that a truthful but unresponsive answer constitutes perjury opens witnesses to prosecution in every one of these instances, whenever the questioner leaves the unresponsive answer on the record.

The possibilities for abuse and for discriminatory applications of such a test are disturbing. Like other laws which cut too broadly the test of unresponsiveness would apply to so many cases that it would either be unenforced, thus inviting disrespect for the law; or it would be enforced most frequently against those in disfavor.

The American Law Institute, in its comments to the perjury sections of the Model Penal Code, adopted a policy against such prosecutions in its treatment of an analogous problem, arising from *United States* v. *Remington,* 191 F.2d 246 (2d Cir. 1951), *cert. denied* 343 U.S. 907 (1952). (Model Penal Code § 208.20, Comments (Tent. Draft No. 6, 1957), pp. 116-118, incorporated by reference in § 241.1 of the 1962 Proposed Official Draft.)

> "The likelihood of achieving moral reformation by imprisoning one who has, objectively, told the truth is not high. Encouraging the police to inquire as to subjective dishonesty behind the objective truth would not only waste their time, but opens substantial possibility of abuse." (Comments, p. 118)

Under the test of objective truthfulness the law of perjury would protect the sanctity of the oath and the processes of our courts, while its applications would be clear, enforceable and non-discriminatory. To convict an unresponsive but truthful witness of perjury is excessively harsh, and tends to defeat the ends of the law rather than to serve them. We urge this Court to adopt the test of objective truthfulness heretofore followed by most Circuit Judges, and to reverse the conviction below.

II. The Questioning Was Too Ambiguous to Form a Fair Basis for a Charge of Perjury.

Mr. Bronston was being examined about the assets of a company in Chapter XI. Since he was the president and sole stockholder of that company, his own assets could also come into question. After being asked many questions about both the company's assets and his own, the questions in issue were asked.

It may be helpful to look at them again.

> "Q. Do you have any bank accounts in Swiss banks, Mr. Bronston A. No, sir.
>
> Q. Have you ever? A. The company had an account there for about six months, in Zurich.
>
> Q. Have you any nominees who have bank accounts in Swiss banks? A. No, sir.
>
> Q. Have you ever? A. No, sir." (PA 17).

Then the following questions were asked and the following answers were given.*

---

* This section of the 21(a) examination was never read to the jury. The entire 21(a) examination was marked by the Government and then part of it was read to the jury by the prosecutor, at

(footnote continued on following page)

"Q. Do you have a bank account in Rome at the Banco Commerciale? A. No, sir, I don't have it any more.

Q. Did you at one time? A. We had it there during the period of production of John Paul Jones.

Q. Who is 'we,' the company? A. We made a picture called John Paul Jones.

Q. I know, but was it the company that had the bank account? A. It started with me and then it switched to the company." (PA 17-18).

The word "you" can refer to either a company or an individual. For example, an officer of General Motors, if examined, could be asked: "How many cars did you manufacture in June", referring to the company, or "How long have you been driving", referring to the individual. If he were asked "Have you ever had any Swiss bank accounts", the question could refer to either company accounts or personal accounts.

The lawyer examining Mr. Bronston never made clear the nature of the account about which he was asking. The answer "The company had an account there for about

---

(footnote continued from preceding page)

the outset of the trial (R 35, 1/27/71 Tr. T. 56-59). The trial judge apparently assumed that the entire transcript was being treated as in evidence, though some confusion developed on this score when the jury during its deliberations asked for the transcript of the bankruptcy proceeding, and counsel agreed to send in only the questions and answers that had been read, treating only those as in evidence. (R 43, 2/2/71 Tr. T. 33-34). On further reflection, petitioner's counsel took the position before the Court of Appeals that the transcript of the entire 21(a) examination, an official record of the District Court, could properly be judicially noticed by a court when considering the questions of law raised on appeal. The Second Circuit did not rule on the point or refer in its opinion to the questions on the Italian account. We believe that this portion of the 21(a) examination, which immediately follows the four questions on Swiss accounts, may properly be considered by this Court in passing on the issue of whether the questions were ambiguous as a matter of law.

six months, in Zurich" was not only true but took a step to clarify the ambiguity in the questioning. If the questioner wanted to know about personal accounts after such an answer he need only have said so. He did not. Nor did he return to clarify the ambiguity after the immediately following questions on the Roman account must have forcefully brought home the possibility of an ambiguity. To charge the witness with perjury under such circumstances was unfair and such a conviction should not be permitted to stand.

United States v. *Wall*, 371 F.2d 398 (6th Cir. 1967), held that in a situation of this sort, where the question could mean either one of two things, a perjury conviction could not be sustained as a matter of law if the proof simply established a contradiction with one of two meanings.

In *Wall*, the court's description of the charges was:

> "The indictment alleged that she testified falsely before the grand jury as follows:
>
> 'Q. Have you ever been on trips with Mr. X? A. I have not.'
>
> "The indictment further alleged:
>
> 'The aforesaid testimony of defendant Loretta Wall, as she then and there well knew, was not true, in that she had been on a trip with Mr. X in Miami Beach, Florida, from February 14, 1964 through February 20, 1964.' "

The opinion went on to point out that the words "by a trip—on a trip", as defined by the Assistant United States Attorney, "can mean either one of two things: That a person accompanied somebody else travelling with, or it can mean that they were there at a particular place with a person." The court noted that the evidence might have shown that under one of the interpretations the answer

was false, but not under the other. It then went on to hold:

> "The trouble with this case is that the question upon which the perjury charge was based, was inarticulately phrased, and, as admitted by the prosecution, was susceptible of two different interpretations.
>
> "In our opinion, no charge of perjury can be based upon an answer to such a question."
>
> • • •
>
> "This must be so because the essence of the crime of perjury as defined in the statute is the belief of the witness concerning the veracity of his testimony. United States v. Winter, 348 F.2d 204 (2d Cir. 1965), cert. denied 382 U.S. 955, 86 S.Ct. 429, 15 L.Ed.2d 360. In a case where the question propounded admits of several plausible meanings, the defendant's belief cannot be adequately tested and it is necessary to determine what the question meant to him when he gave the disputed answer." 371 F.2d at 399-400.

See also *United States* v. *Lattimore*, 127 F. Supp. 405 (D.C.D.C. 1955), *aff'd*, 232 F.2d 334 (D.C. Cir. 1955); *Galanos* v. *United States*, 49 F.2d 898 (6th Cir. 1931).

The Second Circuit's decision in this case exposes a witness to a charge of perjury where the fault, if any, lies with the questioner. This Court should adopt the rule in the cases cited above, which is applicable to the facts of the instant case, and reverse.

III. Perjury Was Not Shown on the Whole Record.

The Government's proof at trial was essentially confined to the evidence of an officer of the Geneva bank, testifying with petitioner's consent, who identified the records of the Geneva account. Not only were the peti-

tioner's answers at the 21(a) examination conceded to be true, but the Government did not dispute the facts that the account had been closed for two years, dormant for four and was without assets. It was in petitioner's own name, not a numbered account, and he had publicly issued checks on it, signed by him. The record contained uncontradicted evidence that the account was known to the accountants of the company who were employed when it was active, that it was not treated as a secret (R 34, 2/1/71 Tr. T. 7-10, 20-21), that it was opened as part of an ordinary commercial transaction to discount a note (R 27, Deft. Exhs. H, I, J; R 35, 1/27/71 Tr. T. 63-65, 73-75), and that it was a waiver of Swiss bank secrecy which petitioner had given his creditors which produced the records on which the prosecution relied (R 27, Deft. Exhs. A, B, C, D; R 35, 1/27/71 Tr. T. 69, 71; and 1/27/71 Tr. T. 75-77).

Where answers are true no inference may be drawn from proof of objective falsity that the accused knew his statements to be false. *Cf. United States* v. *Sweig*, 441 F.2d 114, 117 (2d Cir. 1971), *cert. denied* 403 U.S. 932 (1971). Here, moreover, the events to be recalled were old, so that more proof was needed to show perjury than the existence of the account, *Fotie* v. *United States*, 137 F.2d 831 (8th Cir. 1943), which was all that the Government proved. It was significant that the account was without assets, *cf. United States* v. *Mousley*, 201 F. Supp. 510 (E.D. Pa. 1962), *aff'd without opinion*, 311 F.2d 795 (3d Cir. 1963), *cert. denied* 372 U.S. 966, and that it was disclosed by the defendant himself, by his waiver of bank secrecy, *cf. United States* v. *Rose*, 215 F.2d 617, 623-4 (3d Cir. 1954).

The perjury statute should not be construed to permit conviction—for making truthful answers—on such a record as this.

In the Second Circuit the Government argued that it took the creditors three years to obtain the records of the account by using the waiver of bank secrecy. The waiver was given to a creditors' committee on July 30, 1965. (R 35, 1/27/71 Tr. T. 78-79; R 36, 1/29/71 Tr. T. 47-48.) There was no evidence that the creditors' committee sought to use the waiver. The record shows that one creditor knew of the transaction in which the account had been opened in 1959 (R 27, Deft. Exhs. H, I, J; R 35, 1/27/71 Tr. T. 63-65, 73-75), that it was he who in 1966 through counsel asked the questions on which the indictment was based, that he obtained the right to use the waiver in June of 1967, designated an agent to use it on November 14, 1967, retained Swiss counsel and asked the Geneva bank for the records on which this prosecution was based on January 10, 1968, which was almost immediately after he had completed his preparations to use the waiver. (R 27, Deft. Exhs. A, C, D; R 35, 1/27/71 Tr. T. 69, 71; and, 1/27/71 Tr. T. 75-77.)

The Government also argued below that the Geneva account was not specified in the waiver. The waiver on its face, however, was a document intended to open any door to any Swiss bank that the creditors' committee should at any time want to open. There was no evidence that the committee asked for anything else. (R 27, Deft. Exh. B; R 35, 1/27/71 Tr. T. 69, 71.)

The Government argued below that because one of Mr. Bronston's accountants testified he hadn't known of the Swiss account, this was evidence it had been kept secret. But the record was clear that this particular accountant had not worked for the company till after the account had become dormant. (R 36, 1/29/71 Tr. T. 65-68.) The company treasurer, who was with the company when the account was active, testified without contradiction that the account had been known to the company's accounting staff at that time and had never been kept secret (R 34, 2/1/71 Tr. T. 7-10, 20-21).

Though we recognize that this Court does not normally concern itself with reviewing the sufficiency of the evidence, the evidence in this record shows how little there was to the case and underscores the risks of permitting prosecution of witnesses for true answers. Here a witness was asked about bank accounts. His answers were true. The questioner gave no indication that he considered the answer about the company's account to be unresponsive, and he asked nothing further about personal accounts. Petitioner had never kept this personal account secret and had no motive to conceal it. The notion that he was engaged in criminally deceptive conduct is at best conjectural, not rooted in evidence that inspires confidence. Yet it is only such conjecture that stands against the undisputed fact that his answers were true.

Conclusion

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed, and that an order should be entered dismissing Count 1 of the indictment.

Dated: New York, N. Y., June 1, 1972.

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PETITIONER'S APPENDIX

Portions of Pages 3, 124 and 125 of Transcript of § 21(a) Examination.

[Page 3]

* * *

Q. Mr. Bronston, you were the president of Samuel Bronston Productions, Inc.? A. Yes, sir.

Q. How long did you hold that office? A. Since the incorporation of the company, sometime in 1959.

Q. And from 1959 to the beginning of 1964, were you the chief executive of the company? A. Yes, sir.

Q. You are familiar with its business? A. Yes, sir.

Q. Is it correct that Samuel Bronston Productions, Inc. acted as a general partner in a number of limited partnerships? A. Yes, sir.

Q. And are those the limited partnerships that are involved in the arrangement proceedings here? A. I presume so.

[Page 124]

* * *

Q. Do you have any bank accounts in Swiss banks, Mr. Bronston? A. No, sir.

Q. Have you ever? A. The company had an account there for about six months, in Zurich.

Q. Have you any nominees who have bank accounts in Swiss banks? A. No, sir.

Q. Have you ever? A. No, sir.

Mr. Palmer: The brother-in-law in Paris who got the $300,000-odd, Verona, Phillips.

Q. Do you have a bank account in Rome at the Banco Commerciale? [Page 125] A. No, sir, I don't have it any more.

Q. Did you at one time? A. We had it there during the period of production of John Paul Jones.

Q. Who is "we," the company? A. We made a picture called John Paul Jones.

Q. I know, but was it the company that had the bank account? A. It started with me and then it switched to the company.

Q. And it remained the company? A. It was dissolved. I think it's closed, because it's too long ago.

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1011

SAMUEL BRONSTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A15) is reported at 453 F. 2d 555. The opinion of the district court is reported at 326 F. Supp. 469 and is reprinted as Appendix A to this brief.

JURISDICTION

The judgment of the court appeals (A. 10) was entered on December 10, 1971. On January 3, 1972, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including February 8, 1972. The petition was filed on February 7,

1972, and was granted on April 17, 1972. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was substantial evidence to support the jury's finding that petitioner, with full knowledge of the information sought by a material question put to him during a hearing held pursuant to Chapter XI of the Bankruptcy Act, intentionally falsified his answer.

2. Whether an answer disclosing part of the truth that also constitutes a lie by negative implication may be perjurious.

STATUTE INVOLVED

18 U.S.C. 1621 provides:

> Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

STATEMENT

Petitioner, the president and sole owner of a motion picture production corporation which petitioned for

an arrangement with its creditors pursuant to Chapter XI of the Bankruptcy Act (11 U.S.C. 701 *et seq.*), was convicted after a jury trial in the Southern District of New York on one of two counts of perjury. The charges arose from testimony that he gave in June 1966 before the referee appointed to hold hearings to determine the existence and location of the corporation's assets for the benefit of its creditors.[1] He was sentenced to six months' unsupervised probation and fined $2,000. The court of appeals affirmed the conviction, one judge dissenting.

The conviction was based upon the following questions and answers given by petitioner in the bankruptcy proceedings (A. 5):

> Q. Do you have any bank accounts in Swiss banks, Mr. Bronston?
>
> A. No, sir.
>
> Q. Have you ever?
>
> A. The company had an account there for about six months, in Zurich.
>
> Q. Have you any nominees who have bank accounts in Swiss banks?
>
> A. No, sir.
>
> Q. Have you ever?
>
> A. No, sir.

The undisputed evidence showed that for a period of nearly five years between October 1959 and June 1964, petitioner had had a personal account in a bank in Geneva, Switzerland, into which he made deposits and

[1] Petitioner was acquitted on a second count charging another instance of perjury in the same proceedings (see A. 6-8).

upon which he drew checks totaling more than $180,000.[2]

In submitting to the jury both the count upon which petitioner was convicted and the one upon which he was acquitted, the court instructed that the "basic issue" was whether petitioner "spoke his true belief" (App. B, *infra*, p. 43). Perjury, the court stated, "necessarily involves the state of mind of the accused" and "essentially consists of wilfully testifying to the truth of a fact which the defendant does not believe to be true" (*ibid.*). Petitioner's testimony could not be found to be "wilfully" false, the court continued, unless at the time the testimony was given petitioner "fully understood the questions put to him but nevertheless gave false answers knowing the same to be false" (*ibid.*). An individual, the court thereafter said, cannot wilfully state a falsehood in response to a question he does not understand," and the jury was therefore instructed that if it found that petitioner "did not understand a particular question put to him by the questioner and therefore gave a nonresponsive answer, that answer cannot be perjurious" (*id.* at 44).

On the other hand, petitioner could be guilty of perjury, the court instructed, if he gave an answer which was "not literally false but when considered in the context in which it was given, nevertheless constitute[d] a false statement" (*id.* at 45); he thus could be guilty, so long as he "understood a particular ques-

[2] Gov. Ex. 6. The last substantial deposit into the account was made in February 1962, and the account was basically inactive subsequent to that time.

tion put to him," even if he "responded in a manner that is technically true" (*ibid.*).

In sum, as the court subsequently instructed, "[t]he words 'knowingly' and 'wilfully' are therefore opposed to the idea of an inadvertent or accidental misstatement," so that if petitioner "by innocent mistake made an erroneous or incorrect statement" or gave "factually incorrect testimony because of surprise, confusion, haste, inadvertence, negligence or an honest belief that he was telling the truth" he could not be found guilty of perjury (*id.* at 46). Only if he "was aware of the fact that he was making a false statement and knew and believed that his statement was false when made," the court instructed, could he be found to have knowingly and wilfully perjured himself within the statutory intendment (*ibid.*).

SUMMARY OF ARGUMENT

In accordance with the clear and careful instructions of the district court, the jury, in convicting petitioner, must have found that his response that the company had an account for about six months in Zurich constituted a false denial of the existence of any personal accounts in Switzerland and that, beyond a reasonable doubt, that response was made with an intent to deceive. Petitioner's contention that the questioning was too ambiguous to provide a foundation for a perjury conviction fails both as a factual and as a legal proposition. The jury was instructed that the petitioner must be found to have understood the question, and it so concluded. The courts below were correct, moreover, in rejecting the attack on the

question as a matter of law; in the context, the question unmistakably sought information about petitioner's personal accounts, if any, and any ambiguity as to whether information regarding corporate accounts was also sought is not legally material. Under either resolution of any such ambiguity, petitioner's response falsely denied, by negative implication, the existence of the personal account.

The contention that the answer was truthful but simply unresponsive also does not withstand analysis. The "unresponsiveness" of the answer would be apparent only to one in full possession of the facts sought to be elicited by the question, and an unresponsive answer knowingly given for the purpose of deceiving the questioner, and having the actual effect of deflecting the inquiry, should properly be considered false and perjurious. Moreover, the evidence here was sufficient to permit the jury to find that petitioner knew of the existence of the personal account at the time he was questioned and had the necessary intent to deceive when he responded.

Given the sufficiency of the evidence supporting the jury's findings beyond a reasonable doubt that petitioner understandingly gave testimony that was false by negative implication and did so with an intent to deceive, there remains the question whether, as a matter of law, such a response nevertheless cannot be the basis of a perjury conviction when the precise words uttered were, as far as they went, literally true. In other areas of the law involving criminal utterances, such as fraud, extortion, and criminal solicitation, the courts do not confine themselves to the literal words

used, but look to the meaning of the words in the context of their utterance. Since the central purpose of the perjury prohibition is to prevent the making of statements that mislead the inquiry and frustrate the effort to uncover the truth, no reason appears why a different approach should prevail in the case of perjury. Indeed, adoption of the debilitating interpretation of the perjury statute urged by petitioner would open the door to serious subversion of the fact finding process in official and judicial proceedings by clever witnesses who, by virtue of their superior knowledge of the underlying facts that are the subject of the inquiry, could with impunity mislead and deceive by half-truths whose essential falsity becomes apparent only with full knowledge of the facts suppressed. The courts below, therefore, correctly held that the perjury statute encompasses knowing and deceitful falsehoods by negative implication, such as petitioner's response here.

ARGUMENT

I. THE JURY PROPERLY FOUND THAT PETITIONER KNOWINGLY AND INTENTIONALLY GAVE A FALSE ANSWER TO A MATERIAL QUESTION

The jury was instructed that it could not convict petitioner on either count unless it found, as to that count, that he fully understood what information was requested of him and gave a response that he knew to be false. By its verdict, therefore, the jury necessarily found that petitioner was not misled or confused by any lurking ambiguity in the question whether "you" have ever had any Swiss bank accounts, and further

that his answer that "[t]he company" had had one "for about six months" constituted a knowing and false denial of the existence of the much more significant personal account which he had maintained over a period of years.[3] Petitioner contends, in effect, that the evidence was insufficient to support the jury's verdict because (1) the question was "too ambiguous" (Pet. Br. 10), (2) his reply was "a true answer which [was merely] unresponsive" (Pet. Br. 6), and (3) there was no evidence that he either was aware that his answer was false (Pet. Br. 14) or had any motive to falsify (Pet. Br. 16).

A. THE QUESTION WAS NOT IMPERMISSIBLY AMBIGUOUS

Petitioner's claim that the question was too ambiguous to permit the jury to find him guilty is predicated upon the argument that "you" could have referred either to his company or to him personally. Both the majority and the dissent in the court of appeals rejected this contention (Pet. App. A5–A6, A13).

[3] It would appear that the jury acquitted petitioner on the second count precisely because it had a reasonable doubt whether he fully understood what information was requested of him by the inquiry embodied in that count. The question asked, on three separate occasions, was whether he had any "interest" in a particular motion picture film which he claimed he had made for the Spanish government (A. 6–7). His negative responses were charged to be perjurious because he allegedly knew that the Spanish government did not "own" the film but rather that he and companies in which he had an interest "did own and have an interest" in it (A. 8–9). The court instructed that he would have to be acquitted on that count if he and his inquisitor "did not understand the words 'own' and 'interest' in the same sense" (App. B, *infra*, p. 44).

The question was put during what is known as a Section 21(a) hearing (11 U.S.C. 44(a)), held to determine the existence and location of assets of a business that, in this case, was essentially a personal enterprise of petitioner although operated by him in corporate form. In that context, the most reasonable interpretation of the word "you" employed by the examiner was that it did not refer to either petitioner or the company *alone,* but rather that it referred to *both;* the interrogator, a lawyer for one of the creditors, would naturally and properly be interested in identifying both corporate and personal assets in order, in ascertaining what was available for the creditors, to determine whether corporate assets had been diverted to petitioner's personal use.

If there was any ambiguity in the question, it could only have been whether "you" referred solely to petitioner personally, or referred both to him personally and to the corporation—in the context, the question could not reasonably have been understood to refer only to the corporation.[4] This ambiguity is not legally significant in the framework of this case, since under either interpretation of the word "you," the question

[4] The question immediately preceding this allegedly ambiguous question was "Do you have any bank accounts in Swiss banks, Mr. Bronston?" This clearly was addressed at least to personal accounts of the petitioner, and the subsequent question provides no basis for a supposition that the context had suddenly switched to an inquiry confined to company accounts. Moreover, as the court of appeals pointed out (Pet. App. A5), the form of petitioner's response, referring specifically to "the company," manifests his understanding that the question embraced personal accounts; otherwise, it would have been unnecessary to preface the answer with the words "the company."

necessarily called for information regarding any personal accounts that petitioner may ever have had in Switzerland. Certainly it was open to the jury—having been clearly instructed that a meeting of the minds between inquisitor and respondent concerning the meaning of a question is a necessary prerequisite for a perjurious answer—to conclude from the form of the questioning and the nature of petitioner's reply that petitioner understood the inquiry to call for revelation of the Geneva account. The jury thus could, and did, properly find that when he asserted in answer to the question that the company had had an account, he said in effect that he himself had had none.

A question will not provide the foundation for a perjury conviction if it suffers from either of two vices arising from ambiguity—(1) that it employs terminology that is vague or confusing; or (2) that it is so worded that it may be asking either of two different questions *and* the defendant's answer is truthful as to one of them. Illustrations of the former possibility are *United States* v. *Lattimore,* 127 F. Supp. 405 (D.D.C.), affirmed *per curiam,* 232 F. 2d 334 (C.A.D.C.), and *United States* v. *Cobert,* 227 F. Supp. 915 (S.D. Cal.). The question in *Lattimore* concerned whether the defendant there was a "follower of the Communist line" and a "promoter of Communist interests" (see 127 F. Supp. at 406)—they thus asked for evaluational characterizations over which reasonable men could differ and which, when embodied in perjury counts, constituted "an open invitation to the jury to substitute, by conjecture, their understanding of the phrase for that of the defend-

ant." *Id.* at 410. In *Cobert,* one of the allegedly perjurious answers was given in response to a question about a "listing post," and nothing in the indictment indicated that the defendant understood the meaning of that phrase. The court found that the phrase was so vague that it would not support a perjury indictment (227 F. Supp. at 918). In the present case, the question called with clarity for specific factual information regarding the existence of petitioner's Geneva account, and the jury found that he so understood it.

Nor did the questioning of petitioner suffer from the second vice mentioned above, that of posing alternative and inconsistent factual inquiries without specifying which alternative is being asked. The contrast with *United States* v. *Wall,* 371 F. 2d 398 (C.A. 6), relied upon by petitioner, is instructive. In that case, the defendant was asked whether she had "ever been on trips with Mr. X," which she denied. The perjury charge asserted that she had been with him in Miami Beach, but the evidence failed to show that she had traveled with him to that city. The defendant could have been on a trip with Mr. X either by accompanying him or by meeting him, but not both, and the question by its terms failed to specify the alternative concerning which the information was sought. There was thus nothing in the defendant's simple negative response to indicate that she had not understood the question to inquire whether she had accompanied him—and as to that interpretation, her answer was truthful. In the instant case, by contrast, petitioner's answer was false and mis-

leading whether the question referred only to personal accounts or to both personal and company accounts.

B. THE JURY COULD PROPERLY REJECT THE VIEW THAT THE ANSWER WAS TRUTHFUL AND MERELY UNRESPONSIVE

Petitioner suggests that, if the question unambiguously called for information regarding his personal accounts, his answer was unresponsive but truthful, and that it is unwarranted to treat an answer of this character as perjurious (Pet. Br. 10). Similarly, the dissent in the court of appeals urges that, by mentioning the corporate account, petitioner sought to do no more than avoid the question, in like fashion to an evasive response that "My daughter attended school in Switzerland" (Pet. App. A14). This analogy, however, is plainly inapposite; it equates with petitioner's answer a statement that is manifestly unresponsive, that could not possibly deflect the course of the inquiry or be construed as a representation of any sort regarding bank accounts, and that could not be found by the jury to indicate an understanding of the question and a willful purpose to mislead the interrogator by a false negative implication. In the present case, by responding with information about the corporate account, petitioner did more than just avoid the issue of his personal account; as the majority below held, his answer constituted a denial "by negative implication" that he had had any personal accounts (Pet. App. A7). The jury, therefore, justifiably viewed his response as a false averment that his only Swiss account had been the corporate one.

Petitioner's answer was thus not comparable to the answers held to be non-perjurious in *Galanos* v. *United States,* 49 F. 2d 898 (C.A. 6), and *United States* v. *Slutzky,* 79 F. 2d 504 (C.A. 3). In those cases, the defendants gave simple negative answers that were both entirely responsive and entirely truthful; Galanos was asked specifically whether he himself had made arrangements to obtain a bail bond for an individual and whether he had personally procured another person to sign the bond (see 49 F. 2d at 898–899), and Slutzky was asked specifically whether he had been convicted of a "felony" (see 79 F. 2d at 505). Since Galanos had done no more than join with others in agreeing to indemnify the person who had actually arranged for and signed the bond (see 49 F. 2d at 899), and since the State in which Slutzky had been convicted did not classify offenses as "felonies" (see 79 F. 2d at 505), their negative answers constituted truthful replies to the precise questions asked. In neither case did the defendant—as did petitioner here—make affirmative statements of one fact that in context constituted denials by negative implication of a related fact.

C. THE EVIDENCE WAS SUFFICIENT TO PERMIT THE JURY TO FIND THAT PETITIONER KNOWINGLY AND WILFULLY PERJURED HIMSELF

We need not pause long over petitioner's contention that there was an insufficient showing that he remembered his personal account (which had been closed two years prior to the Chapter XI hearing) and intentionally neglected to disclose it. As the district court pointed out in denying his motion for judgment of

acquittal or a new trial, the jury could reasonably have found it unlikely that he would remember a corporate account which had existed for only six months and at the same time forget a personal account that had had a longer life and had been used actively and extensively for personal and business transactions (App. A, *infra,* p. 28). Similarly, the waiver of Swiss bank secrecy that petitioner had executed was hardly conclusive that he had no motive or reason to conceal his personal account at the Chapter XI hearing, as petitioner suggests (Pet. Br. 14). As the court below noted, "[t]he jury could have been more impressed by the facts that the purported waiver of bank secrecy referred to all banks in Switzerland and listed seventeen company names under which an account could have been opened (creating the proverbial needle-in-the-haystack situation)" (Pet. App. A 9, n. 5).

II. A STATEMENT WHICH IS FALSE ONLY BY NEGATIVE IMPLICATION CAN BE PERJURIOUS

Implicit in the position of petitioner and the dissent below is the contention that a statement which is false only by negative implication rather than by its express language cannot be perjurious. This contention does not challenge the sufficiency of the evidence, but in essence attacks the trial court's instruction that a statement which is "technically true" or "not literally false" can nevertheless be false "when considered in the context in which it was given" (App. B, *infra,* p. 45). As the dissent put the proposition, "[w]hether [petitioner's] answer was calculated to mislead the questioner and frustrate the bankruptcy proceedings

should not here concern us," since "once testimony is found truthful there can be no perjury conviction as a matter of law" (Pet. App. A11).

We perceive no reason why the scope of the offense of perjury should be limited in this debilitating fashion. Contrary to the dissenting view below, it is of central concern to the purpose of the perjury statute whether petitioner's reply was calculated to mislead the questioner and frustrate the bankruptcy proceedings. Misleading the questioner and thereby frustrating official or judicial proceedings is precisely the evil at which the perjury statute is aimed; indeed, the test for the materiality of false testimony is whether it "has a natural effect or tendency to influence, impede or dissuade the investigating body from pursuing its investigation." *United States* v. *Moran*, 194 F. 2d 623, 626 (C.A. 2), certiorari denied, 343 U.S. 965; see also *Carroll* v. *United States*, 16 F. 2d 951, 953 (C.A. 2), certiorari denied, 273 U.S. 763; *Dolan* v. *United States*, 218 F. 2d 454, 458 (C.A. 8), certiorari denied, 349 U.S. 923. The perjury statute should not be interpreted so as to put a premium on the artfulness with which a witness or affiant deceitfully frustrates an inquiry.

No other statute condemning criminal utterances is interpreted so as to determine the criminality of an utterance solely by reference to the precise language used and not by reference to the information or idea that the language is calculated and intended to convey. For example, fraudulent misrepresentations are not limited to statements that are literally untrue, but include as well "deceitful statements of half truths

or the concealment of material facts." *Lustiger* v. *United States,* 386 F. 2d 132, 138 (C.A. 9), certiorari denied, 390 U.S. 951; see also *Silverman* v. *United States,* 213 F. 2d 405, 407 (C.A. 5), certiorari denied, 348 U.S. 828. It is "[n]ot words alone, but their arrangement, the manner of their display, and the circumstances in which they are used [that] may create an appearance which is false and deceptive, even though the words themselves fall short of this." *Linden* v. *United States,* 254 F. 2d 560, 568 (C.A. 4). Similarly, whether an utterance is extortionate is not determined solely by reference to the precise words of the utterance, but rather by "the context in which they are used, measured by the common experience of the society in which they are published." *United States* v. *Prochaska,* 222 F. 2d 1, 2 (C.A. 7), certiorari denied, 350 U.S. 836; *United States* v. *Annoreno,* C.A. 7, No. 71–1233, decided May 26, 1972, slip opinion at 8–9. Even in so sensitive an area as advocacy—invoking questions of First Amendment protection—whether an utterance is an incitement to unlawful conduct is not determined solely by the literal meaning of the precise words used but rather by their "natural and intended effect." *Debs* v. *United States,* 249 U.S. 211, 215; see also *Schenck* v. *United States,* 249 U.S. 47, 51; *Frohwerk* v. *United States,* 249 U.S. 204, 207–209; *United States* v. *Pelley,* 132 F. 2d 170, 177 (C.A. 7), certiorari denied, 318 U.S. 764; *United States* v. *Gordon,* 138 F. 2d 174, 175–176 (C.A. 7), certiorari denied, 320 U.S. 798. There is no reason why any different rule should be applied in cases of perjury.

It is no answer to say, as did the dissent below, that in cases such as this the burden should be "on the questioner to recognize when he is being led astray," and that he must consequently ask "a more precise question" (Pet. App. A15); nor is it relevant, as petitioner asserts, that in this case the examiner "need only have asked one more question, whether [petitioner] personally had had an account" (Pet. Br. 8). Both arguments are predicated on the erroneous premise that petitioner's answer was true and at worst unresponsive (see Pet. Br. 7; Pet. App. A14–A15) rather than false by negative implication. The jury, however, justifiably found that petitioner, when asked about Swiss bank accounts, stated in effect that there had been only the one corporate account; if the answer was truthful, as it purported to be, the subject was exhausted, and the examiner had no reason to inquire further about personal accounts.[5] Further inquiry was thus "successfully deflected" (see Pet. App. A15) by the very device that the perjury statute was enacted to prohibit—an answer that misinformed the

[5] The conclusion that the natural tendency and effect of the answer was to foreclose further inquiry on the subject is not in any way undercut—rather, it is supported—by the subsequent questions and answers about the Rome bank account that petitioner cites (Pet. Br. 11). In that instance, he answered the question whether "you" had a bank account in Rome with an averment that "we" had had one. The nature of this response alerted the examiner to an ambiguity as to the owner of the account and prompted the examiner to inquire further whether "we" was used in the corporate or personal sense. As to the question here at issue, the seemingly clear, comprehensive, and precise reply that "the company" had had a Swiss account closed that subject by impliedly negating the existence of any additional personal or corporate accounts.

questioner. Of course, an examiner can always avoid successful deflection of his line of inquiry if he recognizes that he is being lied to, but that can hardly be deemed a valid reason to immunize the successful liar from punishment.[6]

As the court of appeals pointed out, the need for clear, responsive, and truthful answers is particularly great in a proceeding such as a Section 21(a) examination, which by its nature constitutes a search for assets that may prove difficult to discover. Since the information sought is, in such a case, generally within the peculiar knowledge of the witness, the opportunities for deception and fraud through the statement of misleading half-truths are greater than usual; it is

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[6] Petitioner does not advance his case by invoking the concept of "objective truthfulness" enunciated in the American Law Institute Model Penal Code (Tent. Draft No. 6, 1957), § 208.20, Comments, pp. 116–118 (Pet. Br. 9). "Objective truthfulness," as used by the drafters of the code, does not embrace statements which are half or technically true but nevertheless convey false information; the drafters' concern was with statements which are in fact true but which the utterer does not believe to be true. The comment was prompted by *United States* v. *Remington*, 191 F. 2d 246 (C.A. 2), certiorari denied, 343 U.S. 907, which held that a denial of membership in the Communist party could be perjurious if the person making the denial believed that he was a member, even though in fact he was not. Petitioner's perjury in this case was not a subjective falsehood which objectively was truthful; the objective fact was that he had had the personal Swiss bank account whose existence he denied to the examiner. It does appear elsewhere in the Comments, however, that the drafters of the Model Penal Code would require proof of literal falsity for a perjury conviction. See Tent. Draft No. 6, Comments, *supra* at 124–125. For the reasons stated in this brief, we do not believe that view accurately states the law or adequately implements the policies and requirements of the federal perjury statute.

frequently extremely difficult for the examiner to realize, in the face of an answer such as petitioner's, that something has been concealed (Pet. App. A7–A8).

And, of course, the mischief that could flow from the rule proposed by petitioner and by the dissent below is not confined to bankruptcy proceedings. For example, applicants for professional licenses and nominees for executive appointment, being questioned under oath concerning past incidents or the basis for prior disciplinary sanctions having a bearing on their present fitness to be licensed or to hold office, could without penalty state the most innocuous version of the incident or basis for the sanction, with the intent and effect of creating the impression that what they stated was the entire story. In like fashion, taxpayers being examined under oath could seek by deceit to hide sources of their income or information that would establish that they had understated their income. Similar misleading answers could effectively frustrate factually complex investigations or trials of alleged antitrust violations or securities frauds.

These examples hardly exhaust the possibilities. If petitioner's narrow view of the offense of perjury were to prevail, a new element of chance and wit would be introduced into judicial and official proceedings of all sorts. Lawyers would be able to advise their clients that they could with impunity give any kind of misleading answer so long as their words are literally truthful. And sophisticated witnesses with superior knowledge of the underlying facts would often be able to conceal and distort the truth, outwitting their interrogators in ways that become appar-

ent only when the true facts are known. Answers that appear on their face to be complete and responsive thus would have to be scrutinized from every angle with the utmost care, lest they turn out to be half-truths denying by negative implication information clearly sought to be elicited by the question. As a result, questions that today would be considered wholly unnecessary and redundant would proliferate.[7] There is no sound reason to construe the perjury statute so as to invite such consequences and to sanction the kind of deceit practiced by petitioner.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of conviction should be affirmed.

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JULY 1972.

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[7] For example, if a witness answers the question "Who attended the meeting of June 1?" with the statement "Smith and Brown," it will be necessary to ask the further question "Anyone else?" since the witness could, under petitioner's view of perjury, freely suppress the information that Jones and Robinson also attended.

APPENDIX A

United States District Court, S.D. New York

April 15, 1971

(No. 69 CR 696)

UNITED STATES OF AMERICA

v.

SAMUEL BRONSTON, DEFENDANT

Memorandum

TENNEY, *District Judge.*

The defendant, Samuel Bronston, having been tried before a court and jury and found guilty of one count of perjury in violation of Section 1621 of Title 18 of the United States Code, moves pursuant to Fed. R. Crim. P. 29 for judgment of acquittal or, in the alternative, for a new trial under Fed. R. Crim. P. 29 and 33.

Count one of the indictment[1] in substance charges that Mr. Bronston knowingly testified falsely before a referee in bankruptcy in an arrangement proceeding conducted pursuant to Section 21, sub. a of the National Bankruptcy Act, 11 U.S.C. § 44, in order to conceal the existence of a personal bank account previously maintained by him in Geneva, Switzerland.

Before considering the arguments of counsel in support of this motion, it would be useful to set forth the questions and answers which are the subject of count one.

[1] The defendant was tried upon a two-count indictment and acquitted of the charge in the second count.

1. Q. Do you have any bank accounts in Swiss banks, Mr. Bronston?
A. No, sir.
2. Q. Have you ever?
A. The company had an account there for about six months, in Zurich.
3. Q. Have you any nominees who have bank accounts in Swiss banks?
A. No, Sir.
4. Q. Have you ever?
A. No, Sir.

It is not disputed that movant's responses to questions 1, 3 and 4 were in all respects truthful. However, the response given to the inquiry as to whether he had ever had a Swiss bank account (question 2) was, although perhaps literally true, unresponsive to the question posed. The Government argues, as it did at trial, that this constituted a flat denial of ever having personally maintained a Swiss bank account.

In moving for judgment of acquittal, the defense urges that as a matter of law such testimony cannot be perjurious. The Government, on the other hand, contends with equal vigor that an unresponsive answer may be perjurious if tantamount to a willful attempt to conceal the truth.

After considering movant's numerous arguments set forth in meticulously prepared papers in support of these motions, the Court, for reasons to be noted *infra*, is constrained to deny the motions and permit the jury's verdict to stand.

Analysis of the issues raised on the Rule 29 motion for judgment of acquittal must necessarily begin with close scrutiny of the questions posed to the defendant. To be sure the interrogation was most inept; but this only begs further inquiry as to whether question number 2 was misleading or incapable of eliciting a single honest answer, or whether defendant could consciously

have taken advantage of the situation by giving an unresponsive answer in order to avoid disclosure of his Geneva account.

[1] It is well settled that a person may not lawfully be convicted of perjury unless the question put to him adequately tests his belief in the truthfulness of his response. *United States* v. *Wall*, 371 F. 2d 398, 400 (6th Cir. 1967). This is essentially because perjury is a highly personalized crime, conviction for which is to a great extent dependent upon proof of the accused's belief in the truthfulness of his sworn testimony. *United States* v. *Winter,* 348 F. 2d 204, 210 (2d Cir.), cert. denied, 382 U.S. 955, 86 S. Ct. 429, 15 L. Ed. 2d 360 (1965).

[2, 3] Thus, assuming as we have, that the questioning of the defendant was less than skillful, it nevertheless seems plain that the question—"[h]ave you ever" had a Swiss bank account?—admits of but a single interpretation calling for a simple yes or no answer. This question is patently not misleading and readily susceptible to a truthful and responsive answer. Movant unavailingly cities *Galanos* v. *United States,* 49 F. 2d 898, 899 (6th Cir. 1931), wherein the Court of Appeals for the Sixth Circuit reversed a perjury conviction and noted that "[p]erhaps, if * * * [the defendant] had been asked specifically, he would have answered truly". In the instant case, after Mr. Bronston replied negatively to the question—"Do you have any bank accounts in Swiss banks * * * ?"—he was specifically asked: "Have you ever?". Thus, in plain unambiguous language the defendant was specifically asked the crucial question to which he evasively replied. The distinction between *Galanos, supra,* and the instant situation is thus apparent and unworthy of further comment. Moreover, since a 21–A examina-

tion is in the nature of a "fishing expedition"[2] conducted for the purpose of locating assets of the debtor, there is no duty upon the examiner to rephrase each question, or to warn the witness to testify truthfully. It is in fact the bankrupt and not the interrogator who would have exclusive knowledge of the whereabouts of his assets. As noted by Judge Weinfeld in United States v. Winter, *supra,* 348 F. 2d at 210, "[o]nce a witness swears to give truthful answers, there is no requirement to 'warn him not to commit perjury or, conversely to direct him to tell the truth.' It would render the sanctity of the oath quite meaningless to require admonition to adhere to it."

Similarly inapposite is the situation that existed in *United States* v. *Wall, supra,* 371 F. 2d at 399, wherein the defendant denied having "ever been on trips with Mr. X". The indictment charged that this testimony was perjurious in that the defendant "had been on a trip with Mr. X in Miami Beach, Florida * * *." In response to defense counsel's inquiry at a hearing before the district court, as to what the words "on a trip" meant, the government attorney in substance replied that it could mean either that one person accompanied another some place or that two persons were at a particular place together. On appeal, the court of appeals indicated that the evidence at trial, although improperly received, clearly demonstrated that the defendant did not accompany Mr. X to Miami Beach. Although there was competent and sufficient evidence to establish that the accused and Mr. X were in Miami Beach together, the conviction below was reversed, the court noting that "the question upon which the perjury charge was based, was inarticulately phrased * * * [since it] was susceptible of two different interpretations". *United States* v. *Wall, supra* at 399–400.

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[2] Trial transcript (hereinafter referred to as "Tr.") of Jan. 27, 1971 at 90.

It seems clear that the question posed to the defendant herein did not admit of different plausible interpretations and was sufficiently precise to test the accused's belief in the truthfulness of his answer. Cf. *United States* v. *Wall, supra* at 400; *United States* v. *Lattimore,* 127 F. Supp. 405 (D.C.D.C.), aff'd, 98 U.S. App. D.C. 77, 232 F. 2d 334 (1955).

I am also not persuaded that the district court's rulings in *United States* v. *Cobert,* 227 F. Supp. 915 (S.D. Cal. 1964), compel a conclusion to the contrary. Indeed, in language similar to that used in *Cobert, supra,* at 919, the jury was instructed that if they found that "the defendant did not understand a particular question put to him by the questioner and therefore gave a non-responsive answer, that answer cannot be perjurious, [since] [o]ne cannot wilfully state a falsehood in response to a question he does not understand." [3] The jury was further charged, although admittedly with an emphasis on count two, that if "the questions were less precise than they should have been, this * * * [should not] be permitted to prejudice the defendant".[4] In the instant case, the jury must have rejected any contention that the defendant's non-responsive answer resulted from a misunderstanding of the simple question put to him; that is, his response must have been considered by the jury as one that reflected perjury and not a misunderstanding. See *United States* v. *Sweig,* 316 F. Supp. 1148, 1164 (S.D.N.Y. 1970).

[4,5] Movant further urges that an acquittal is warranted under the holding of *United States* v. *Slutzky,* 79 F. 2d 504 (3rd Cir. 1935), wherein the court noted that the questions put to the accused must search for the truth, and reversed a conviction because the answer which was the basis of the perjury indict-

[3] Tr. Feb. 2, 1971 at 12.

[4] *Id.*

ment was technically and actually *responsive* and correct. The critical and controlling distinction between the response in *Slutzky, supra,* and the one given herein, is that while Mr. Bronston's answer may have been truthful, it was not responsive. Thus, although a truthful and responsive answer may not be perjurious, a technically truthful but unresponsive one may. Again, the jury was specifically instructed on this point.[5] From the foregoing it seems clear that movant's answer to the second question was not "literally accurate, technically responsive, or legally truthful" within the meaning of *Smith* v. *United States,* 169 F. 2d 118, 121 (6th Cir. 1948); accord, *United States* v. *Wall, supra,* 371 F. 2d at 400; *see Galanos* v. *United States, supra,* 43 F. 2d at 899.

I similarly reject defendant's contention that the holding of *Fotie* v. *United States,* 137 F. 2d 831 (8th Cir. 1943) requires that a judgment of acquittal be entered on count one. Although the language from *Fotie* cited by movant is indeed strong, the facts underlying the reversal therein significantly undercut the thrust of the defendant's argument. In response to inquiries as to whether he ever swore that he was born in Italy or ever applied for naturalization papers in the United States, the defendant in substance answered negatively but qualified his response by stating that he did not remember. *Fotie* v. *United States, supra* at 842. Thus, in order to establish the guilt of the accused it was incumbent upon the Government to establish that he remembered filing a declaration of intention to become a citizen, in which he swore that he was born in Italy. When shown an original and duplicate of his declaration, filled out approximately 24 years prior to the examination which formed the basis of the indictment, he promptly admitted the

[5] *Id.* at 13.

genuineness of the document and that the signature thereon was his. He denied, however, any recollection of placing his signature thereon. Inasmuch as the issue was not whether he had in fact filled out the application, but rather whether he remembered doing so some 24 years before, the conviction on this count was reversed since there was no proof of anything other than that the act not remembered did in fact occur. *Fotie* v. *United States, supra* at 842.

Thus, while in *Fotie, supra,* the alleged perjury was based upon a defendant's denial of remembering an oath made by him 24 years prior to the questioning upon which the indictment was based, the situation herein involves a Swiss account which existed only two years prior to the interrogation and which was active four years prior thereto. Moreover, Mr. Bronston never disclaimed knowledge of ever having personally maintained a Swiss account; but, rather, he unresponsively and perhaps evasively answered that his company had one. I do not suggest that in the instant case mere proof of the existence of the account would suffice to sustain the conviction; rather I wish to place in proper perspective the amount of recall at issue in each case.

[6, 7] Finally, with regard to defendant's motion for judgment of acquittal, the Court must consider whether the facts from which the jury could have inferred the defendant's state of mind were sufficiently proved by direct evidence. *United States* v. *Remington,* 191 F. 2d 246, 249 (2d Cir. 1951), cert. denied, 343 U.S. 907, 72 S. Ct. 580, 96 L. Ed. 1325 (1952). Initially it should be noted that the waiver of bank secrecy, the document so heavily relied upon by movant which was executed in 1965, could have been considered by the jury as direct evidence that when it was executed the defendant was aware of the existence of the Geneva account. The jury could thus have

further inferred that he remembered this account when he was questioned in 1966. In addition, although the account was closed for two years and dormant for two more prior thereto, there was direct proof that while the account was active it was used extensively for personal and business transactions. (Indeed, the jury requested that the exhibits of the cancelled checks be furnished them during their deliberations.) Further, the fact that the defendant unhesitatingly recalled that he presently had no Swiss accounts or nominees with such accounts, but remembered that his corporation had one in Zurich for about six months, could properly have been considered by the jury as direct evidence from which they could infer that movant was familiar with, and remembered his foreign financial affairs. Finally, since the cancelled checks in evidence were, for the most part, substantial in amount, this is also direct evidence which could suggest or at least permit the inference that when the defendant was questioned before the referee, he was aware of the existence of the account.

Defendant alternatively moves for a new trial under Fed. R. Crim. P. 33,[6] based upon the prosecution's allegedly improper and prejudicial summation. Central to his argument herein is the contention that a key issue for the jury on count one was whether the defendant kept his Geneva account secret from his principal creditor Pierre duPont III. That part of the Government's summation placed in issue by the defense is as follows:

> He never said in that waiver, "I have an account at the International Credit Bank in Geneva. I have a specific account."

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[6] Defendant also moves for a new trial under Fed. R. Crim. P. 29, but since there is no issue of credibility this motion is also denied.

He just says, "Any accounts that I may have", and he also lists a whole slew of companies.

Mr. Elsen says, "Well, Mr. duPont knew about it."

How did Mr. DuPont know about it? By this one document? This is the document they seem to rely on, where the account was started after $75,000 was transferred to the Chase Manhattan Bank.

First of all, there is nothing that says [sic] here anything about the International Credit Bank except Bank Redint. If you are pretty well knowledgeable in these cable addresses then you know, then you can trace it, that that is the International Credit Bank. But there is nothing in that document that says that he opened an account there and there is nothing in any document that the defendant has produced that says that he opened an account there.

There is no way that Mr. duPont would have known about this. And if Mr. duPont had known about this, why did it take him until 1968 to find out about it? You recall the waiver was signed in 1965. It was in August of 1968, two years after he testified and lied about it, that Mr. duPont's representative went to the bank and ascertained that there did exist in fact a bank account there, or had, in Mr. Bronston's name.

Mr. Elsen, the defense has called all these witnesses, peripheral witnesses, to establish that Mr. duPont knew about this. Why not call Mr. duPont—there has been no evidence that he is not alive and well and living in Wilmington right now—if you want to prove that Mr. duPont knew about this.[7]

Initially, it should be noted that at trial defense counsel's only serious objection to the Government's summation was made after the assistant, in effect,

[7] Tr. Feb. 1, 1971 at 92–94.

commented upon the defendant's failure to testify, by stating that "Mr. Bronston didn't state anything to you [the jury]."[8] In response to this objection, the prosecution argued that it made this statement in reply to that part of defense counsel's summation which suggested that the defendant had in fact testified. The record is clear that counsel for movant did, although perhaps inadvertently, state: "Mr. Bronston, as he told you, in his mind * * * considered the Spanish Government to have first claim. * * *"[9]

[8] When the prosecutor's comments are balanced against those of defense counsel and it is considered that the government attorney followed his comment about Mr. Bronston's not stating anything to the jury by explaining that what the defendant allegedly said was "stated to the officials whose depositions you [the jury] heard",[10] it seems plain that this aspect of the summation does not fall within the proscription of the Supreme Court's rulings in *Anderson* v. *Nelson*, 390 U.S. 523, 88 S. Ct. 1133, 20 L. Ed. 2d 81 (1968); *Chapman* v. *California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); and *Griffin* v. *California*, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965). Furthermore, although not in the language suggested by the defendant, the Court instructed the jury that the defendant had a constitutional and legal right not to testify and that exercising this right could in no way be considered against the defendant.[11]

Before refocusing our attention on that part of the government summation quoted above, certain other observations must be made. First with regard to the prosecution's rhetorically asking "[w]hy not call Mr.

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[8] *Id.* at 100, 104–06.

[9] *Id.* at 79.

[10] *Id.* at 100.

[11] Tr. Feb. 2, 1971 at 26–27.

duPont—there has been no evidence that he is not alive and well and living in Wilmington right now—if you want to prove that Mr. duPont knew about this," [12] the Court noted that "[t]he only evidence on Mr. duPont was improperly injected by * * * [the prosecution] in the course of * * * [its] summation [13]," and instructed the jury that "even if Mr. duPont was equally available to both sides, no inference can be drawn against the defendant because Mr. duPont was not called". [14] In addition, the jury was instructed that since there was "evidence that Mr. duPont was hostile to the defendant * * *, cooperating with the prosecution * * * [and] could have been called by the government * * * [the jury could] draw an adverse inference against the government from the failure of the prosecutor to call him." [15] Of course, the jury was further charged that anything said by counsel for the Government or defense "with respect to matters in evidence, whether during the trial, in argument or in summation, is not evidence in the case." [16]

[9] Thus, although it was improper for the Government to offer testimony as to the whereabouts of Mr. duPont, I am confident that the Court's charge with regard to this matter sufficiently warned the jury not to accept the Government's unsworn testimony about duPont as evidence that if he were called he would deny any prior knowledge of the Swiss account in issue.

[10–12] Movant's final two objections to the Government's summation allege that the prosecutor prejudicially distorted the chronology of events leading up to

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[12] Tr. Feb. 1, 1971 at 94.

[13] Tr. Feb. 2, 1971 at 31.

[14] *Id.* at 27.

[15] *Id.*

[16] *Id.* at 28.

the discovery of the Geneva account and that the prosecution incorrectly stated that the defense failed to produce evidence that duPont knew of the opening of the account in Geneva. Since these objections were not interposed at the close of the Government's summation and no protective instructions were sought, doubtless defendant could be deemed to have waived these objections. *United States* v. *Aadal,* 368 F. 2d 962, 965 (2d Cir. 1966), cert. denied, 386 U.S. 970, 87 S. Ct. 1161, 18 L. Ed. 2d 130 (1967); *United States* v. *Johnson,* 331 F. 2d 281, 282 (2d Cir.), cert. denied, *Pheribo* v. *United States,* 379 U.S. 905, 85 S. Ct. 196, 13 L. Ed. 2d 178 (1964). In any event, careful consideration of the merits of these arguments belie their validity. Although the Government admittedly did not go through the chronology of events before the Geneva account was opened, with the same precision defense counsel has in his memorandum of law submitted in support of this motion, the Government's statements were a fair prosecutorial summary of record evidence which could support a conviction. The Government is not obliged to dwell in its summation upon matters which will mitigate the thrust of its proof. Inasmuch as the waiver of secrecy was given the creditors in 1965,[17] assigned to Mr. duPont in June of 1967,[18] after which time he appointed Mr. Michael Stern his attorney in fact,[19] and the account was in fact finally discovered in August of 1968,[20] it was neither unfair nor improper for the Government assistant to state that if Mr. duPont knew about the account when it was opened why did it take him until 1968 to discover it.

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[17] Def.'s Exh. B.

[18] Def.'s Exh. C.

[19] Def.'s Exh. D.

[20] Tr. Jan. 27, 1971 at 79-80.

[13] Moreover, since the defendant contends that Mr. duPont, as his principal creditor, knew about the existence of the account since 1959, when it was opened, it was not improper for the prosecution to hypothetically ask the jury why it was not until two years after Mr. Bronston denied having such an account that Mr. duPont's representative finally discovered it.

I find naive defendant's specific criticism of the prosecution for not referring to those defense exhibits which would indicate that Mr. duPont was in fact aware of the opening of the account. More specifically, I find untenable and reject movant's claim that a new trial is warranted because the Government incorrectly stated in its summation that there was no evidence that duPont knew about the account. Perhaps if this inaccurate comment were uncontradicted by the trial exhibits and testimony, and defense counsel's summation, a different result would be reached. That is, even though the Government's statement that "there is nothing in any document that the defendant has produced that says that he opened an account there," [21] is inaccurate and contradicted by the evidence,[22] it does not run afoul of any authority cited by movant or discovered by the Court.

Finally, it must be noted that defense counsel's summation specifically dwelt on the testimony and exhibits relative to duPont's knowledge of the existence of the account.[23] That the jury perhaps did not think it relevant whether duPont knew of the existence of the account, or did not send for defendant's exculpatory exhibits, is unfortunate for the defense, but it by no means follows that the jury was unaware of the exist-

[21] Tr. Feb. 1, 1971 at 93.

[22] *E.g.*, Def.'s Exhs. I and J.

[23] *Id.* and Tr. Feb. 1, 1971 at 57–60.

ence of the exhibits or was convinced by the Government's inaccurate statements that there was no such evidence.

[14] Lastly we consider defendant's motion for an acquittal or a new trial under Fed. R. Crim. P. 33 based upon the Government's alleged deprivation of exculpatory evidence from the defense. Assuming for purposes of this motion that the following facts, as summarized from the affidavit [24] filed in support of this motion are true, the Court finds the relief requested unwarranted and denies movant's request for a hearing on this issue.

On November 16, 1970, defense counsel met in London, England, with the defendant and Irwin Margulies, Esq., a former New York attorney who represented Mr. Bronston in the past. After showing Mr. Margulies various correspondence and cables relating to the opening of the Geneva account, he (Margulies) indicated that he remembered the transaction, apparently since he introduced Mr. Bronston to the bank and arranged the discount, and that he had told Mr. duPont all that he knew about the matter.[25] In addition, the three men discussed loans made by Mr. Margulies to the defendant through the Dorchester Establishment.[26] In response to an inquiry, defense counsel assured Mr. Margulies that his personal financial affairs would not become involved in the event that he testified on Mr. Bronston's behalf.[27] Admitting a preference to being deposed rather than attending trial, Mr. Margulies nevertheless agreed to come to testify after his New York attorney, Ben-

[24] Affid. of Sheldon H. Elsen, Esq. (dated March 16, 1971).
[25] *Id.* at ¶ ¶ 7–10.
[26] *Id.* at ¶ 11.
[27] *Id.* at ¶ 12.

jamin Poznansky, Esq., reviewed the matter.[28] On January 21, 1971, ten days after the trial was originally scheduled to commence, the defense learned that Mr. Margulies was too ill to come to New York and that Mr. Michael Stern, a person closely associated with the prosecution in this case, had spoken to Mr. Margulies. Mr. Stern was the person sent by Mr. duPont to Geneva to examine the records of Mr. Bronston's account. It further appears, although the significance and relevance of this escapes the Court, that Mr. Burnand, counsel for the Geneva bank who testified on behalf of the prosecution, was called by the Zurich lawyer who presented the Geneva bank with the waiver of secrecy, and was requested to come to New York to testify. Burnand was further advised that Mr. duPont would pay his travel expenses. On the advice of the Geneva bank's New York counsel, Mr. Burnand insisted that the Government reimburse him for his expenses.[29]

Returning to the events of January 21, when it was learned that Mr. Margulies was too ill to come to New York, movant advised the prosecution of its intent to seek leave to depose Mr. Margulies in London. The defense was told by the government attorney that Mr. Margulies had recently called Mr. Stern and informed him that he was requested to come to New York and testify, but before he did so he wanted assurance that there would be no inquiry into his own personal financial affairs. Mr. Stern apparently gave no such assurance.[30]

According to the defendant, and since a hearing is being denied, for purposes of this motion it will be

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[28] *Id.* at ¶ 13.
[29] *Id.* at ¶ 22.
[30] *Id.* at ¶ 25.

deemed true, on January 24, 1971 Mr. Margulies told defense counsel that Mr. Stern had frightened and shocked him during their telephone conversation by confidently talking about the investigations "we" are conducting and the people "we" are going after.[31] Mr. Margulies apparently believed that Stern and the investigations were financed by "duPont money" and that Stern was part of a team working for duPont and the Justice Department.[32] Mr. Margulies was further told by Stern that duPont was "out to get" a number of people who had been associated with Mr. Bronston and apparently believed that if he testified on the defendant's behalf he would be one of those investigated and/or prosecuted by the Government.[33] However, and of great significance herein, is the fact that Mr. Margulies informed movant, and this is not disputed, "that his medical reason for not coming was bona fide".[34] A medical certificate was sent to counsel and is in fact annexed to defendant's affidavit filed in support of this motion.[35] It would be well to pause and note herein that this factor alone vitiates any argument that but for Mr. Stern, Mr. Margulies would have appeared and testified at the trial.

On January 22, 1971, the day after movant learned that Mr. Stern spoke to Mr. Margulies, and was granted permission to take Mr. Margulies' deposition and again delay the trial, counsel for the defense called Mr. Margulies in London who seemed reluctant to assist Mr. Bronston, but nevertheless agreed to a

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[31] *Id.* at ¶ 41.

[32] *Id.*

[33] *Id.*

[34] *Id.* at ¶ 43.

[35] *Id.* and second unnumbered exhibit annexed to Affid. of Sheldon H. Elsen, Esq. (dated Mar. 16, 1971).

deposition on condition that his attorney, Mr. Poznansky, be present.[36]

Since Mr. Poznansky's passport had expired, and he could not obtain an emergency renewal, it was impossible for him to travel to London. As a result thereof and as a "substitute" condition for the deposition, a stipulation dictated by Mr. Poznansky was signed by defense counsel giving Mr. Poznansky veto power over the defendant's use of the deposition. Also at the insistence of Mr. Poznansky, counsel for movant agreed to limit his inquiry to the events precipitating the opening of the Geneva account.[37]

On January 23, 1971, the defense met alone with Mr. Margulies, who stated in repsonse to a question about what he told duPont in October of 1959 about the opening of the Geneva account, that he only informed him of the terms of the note which was discounted when the account was opened. After being confronted with various documents presumably to refresh his recollection, he admitted that he must have told Mr. duPont about the opening of the account. It will be noted that at the ensuing deposition he only admitted telling duPont about the terms and discounting of the note.[38] At this interview, Mr. Margulies refused to discuss the Dorchester transactions, and asked counsel for movant how he knew of his conversation with Mr. Stern. Mr. Margulies further stated that he wished to avoid getting personally involved in the investigation. At this point he also indicated that he feared that Mr. Stern was working with the prosecution and would have implicated him if he testified in New York.

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[36] *Id.* at ¶ 28.
[37] *Id.* at ¶ 32.
[38] *Id.* at ¶ 36.

At the deposition on January 23, 1971, the following matter concerning this situation was put on the record:

> Now I will state for the record that Mr. Margulies has advised me that in a telephone conversation with Mr. Michael Stern, who states that he is employed by Mr. duPont, that if Mr. Margulies gave testimony that he would have his personal affairs dragged into the mud. This type of threat, which I restate only under the circumstances, under the conditions of this lawsuit, would otherwise not have been brought in, is relevant in considering the situation which we now face. We have the situation of a witness who has according to statements to me been threatened and regardless of whether the witness has anything relevant or not to be concerned about in any other context, there is no possible basis upon which he can be harassed at this examination by inquiry into his personal affairs on matters collateral to this lawsuit, which have nothing to do with the direct testimony. I again call upon Mr. Phillips to reserve for this matter the ruling of the Court and to complete any other questions which he may have to complete the record.[39]

The next day, the defense again met with Mr. Margulies who stated his version and the effect of his telephone conversation with Mr. Stern. As indicated *supra*, for purposes of this motion the Court has considered this as true.

Upon return from London, movant furnished the Court with a copy of the transcript of the deposition and enclosed a transmittal letter advising the Court that "The defendant expects to offer the deposition in its entirety, except for those questions, objections

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[38] *Id.* at ¶ 36.

[39] *Id.* at ¶ 38 and Transcript of Deposition of Irwin Margulies, Esq. at 16 (dated Jan. 23, 1971).

and answers adduced on cross-examination when an effort was made to inquire into Swiss bank accounts of the witness." [40]

Again we must pause to note that conspicuously absent from this letter is the slightest hint of any of the issues raised herein.

It appears that Mr. Poznansky consented to the use of the deposition provided that no applications were made to have further questions put to the witness.[41]

In denying the requested relief and a hearing on the issues presented herein, it must be re-emphasized that Mr. Margulies could not have been a witness at the trial. In addition, we must note that although the deposition was not as exculpatory as defendant claims it would have been, Mr. Margulies did in fact give testimony favorable to the accused. The resulting situation is therefore that the defendant was allegedly deprived of a more exculpatory deposition.

Movant contends that the deposition was withdrawn and not offered at trial because Mr. Margulies' refusal to testify about Dorchester would have prejudiced his case. This contention is presently rejected as untimely,[42] since the defendant could have offered the deposition reserving his objections to the Government's inquiry as to Dorchester. I further reject the self-serving excuse that if the deposition were received with the Dorchester matter excised, the defendant's case would still have been prejudiced because of his failure to explain these transactions via Mr. Margulies; first, because he originally did not object to the introduction of evidence relating to Dorchester,[43]

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[40] Letter from Sheldon H. Elsen, Esq. (dated Jan. 26, 1971).

[41] Affid. of Sheldon H. Elsen, Esq. at ¶ 47 (dated Mar. 16, 1971).

[42] *Id.* at ¶ 48.

[43] Tr. Jan. 29, 1971 at 3–4.

and, second, because the Dorchester issue was subsequently abandoned at trial and never mentioned in either summation.

It must next be considered the "less exculpatory deposition" did not in a strict sense deny the defense of any significant evidence. The matters sought to be brought out on the deposition by the defense were for the most part cumulative of record evidence,[44] and matters eloquently explained and emphasized to the jury on summation.[45]

That Mr. Poznansky imposed a limitation on the defendant's scope of inquiry and insisted on a veto power over the use of the deposition is of little moment since prior to the alleged threats by Mr. Stern, Mr. Margulies indicated that he "wanted to have the matter [his testimony] reviewed by his New York attorney, Benjamin Poznansky, Esq. * * *"[46] Moreover, since the Dorchester issue was abandoned at trial, it is equally irrelevant that movant was precluded from inquiring into this matter. And since Dorchester also appears to have been a personal financial matter to Mr. Margulies,[47] it would seem that by his assurances in November of 1970, movant's counsel agreed not to pursue such an issue. Although Mr. Margulies spoke freely about this matter in front of Mr. Bronston and his attorney in November, nothing in the moving affidavit suggests that he was willing to testify about it.[48] Presumably, the November conversation was not being transcribed—nor was Mr. Margulies under oath and subject to cross-examination.

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[44] Def's. Exhs. I and J.

[45] Tr. Feb. 1, 1971 at 57–59.

[46] Affid. of Sheldon H. Elsen, Esq. at ¶ 13 (dated Mar. 16, 1971).

[47] *Id.* at ¶¶ 11–13.

[48] *Id.* at ¶ 11.

I also wish to re-stress the fact that after the deposition was completed the defendant never raised the issues discussed herein; rather, he merely withdrew the deposition from evidence. The Court does not dispute that in the conference in chambers on January 22, 1971, I indicated a strong disinclination to further delaying this trial, but this does not excuse defendant's complete failure to bring such extraordinary accusation to the Court's attention until several weeks after the trial has concluded. A criminal trial is not a game of chance wherein one may keep an "ace in the hole" in the event his client is convicted. Certainly movant's letter of January 26, 1971, wherein he indicated his intention to offer the deposition into evidence did not put the Court on adequate notice of the events underlying the deposition.

Finally, and with equal force, movant is reminded that the testimony that he sought to elicit was, in addition to being cumulative of other record evidence, completely collateral to the central issue in the case. Even if the jury were convinced that Mr. duPont was at all times fully aware of the existence and opening of the Geneva account, this would be no defense to the charge that Mr. Bronston willfully concealed this fact during his 21–A examination. The charge is perjury—not concealment of a bank account from Pierre duPont III.

I conclude, therefore, that movant is entitled to none of the relief requested and am not persuaded that *Brady* v. *Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); *Bray* v. *Peyton*, 429 F. 2d 500 (4th Cir. 1970); *Gregory* v. *United States*, 125 U.S. App. D.C. 140, 369 F.2d 185 (1966), cert. denied, 396 U.S. 865, 90 S. Ct. 143, 24 L. Ed. 2d 119 (1969); *Hernandez* v. *Nelson*, 298 F. Supp. 682 (N.D. Cal. 1968), modified on other grounds, 411 F. 2d 619 (9th

Cir. 1969), the principal cases cited by movant, compel a conclusion to the contrary.

Accordingly, and for the foregoing reasons, defendant's motions are in all respects denied.

So ordered.

APPENDIX B

EXCERPTS FROM TRIAL TRANSCRIPT OF FEBRUARY 2, 1971
(JURY INSTRUCTIONS)

[9] In short, perjury is the wilful giving of false testimony as to a material matter before a competent tribunal while under oath.

The hard core of the charge against a defendant accused of perjury is the contradiction between his belief and his oath. The basic issue, therefore, is whether the defendant spoke his true belief. Thus, perjury, which necessarily involves the state of mind of the accused, essentially consists of wilfully testifying to the truth of a fact which the defendant does not believe to be true. It is important to remember that it is the belief of the individual in the veracity of his sworn testimony which is crucial.

In order to find the defendant guilty of perjury on either count you must be satisfied beyond a reasonable doubt that three of the following four essential elements [10] of the crime have been proven:

> First, that on or about June 10, 1966, the defendant took an oath to testify truly before a referee in bankruptcy sitting in the Southern District of New York, a person authorized by law to administer oaths.
>
> Second: That the defendant made false statements as to matters about which he testified under oath as set forth in the indictment.
>
> Third: That such false statements were wilfully made in that at the time the defendant made these statements he fully understood the questions put to him but nevertheless gave false answers knowing the same to be false.

* * * * *

[11] Thus, your attention during your deliberations will, for the most part, be directed to the second and third elements of the crime charged. Consequently, you must determine whether any part of the testimony allegedly given by the defendant as set forth in both counts of the indictment was false, and if so, did the defendant give any part of that testimony with knowledge at that time that it was false.

Now before we consider the second and third elements of the crimes charged I think a few observations [12] would be in order.

First, you are instructed that if you find that the defendant did not understand a particular question put to him by the questioner and therefore gave a non-responsive answer, that answer cannot be perjurious. One cannot wilfully state a falsehood in response to a question he does not understand.

Similarly, if you conclude that the questions were less precise than they should have been, this may not be permitted to prejudice the defendant. This may be relevant with regard to count 2 of the indictment, for you must decide whether or not the questioner and witness understood the words "ownership" and "interests" to have the same meaning. This is, count 2 essentially charges that the defendant wilfully and knowingly falsely testified that the Spanish government owned the film Sinfonia Espanola and that he and the companies in which he had an interest did not own and have an interest in the film.

If you conclude that there was no meeting of the minds, that the questioner and the witness did not understand the words "own" and "interest" in the same sense, then you must acquit the defendant on the second count.

Thus, in order to convict on count 2 you must [13] be satisfied beyond a reasonable doubt that the de-

fendant understood the terms used but nevertheless wilfully gave a false answer.

Secondly, I instruct you that if you find that the defendant understood a particular question put to him and responded in a manner that is technically true he may still be guilty of perjury.

For example—and I use this as an illustration only—if it is material to ascertain how many times a person has entered a store on a given day and that person responds to such a question by saying five times when in fact he knows that he entered the store 50 times that day, that person may be guilty of perjury even though it is technically true that he entered the store five times.

On the other hand, if the person honestly thought that the questioner wanted to know how many times he entered during a given hour of the day and five was correct, then he has not testified falsely and may not be guilty of perjury.

Similarly, if you find that a particular answer is not literally false but when considered in the context in which it was given, nevertheless constitutes a false statement, the defendant may be guilty of perjury if all of the other essential elements of the crime exist.

* * * * *

[17] You will recall that another essential element of the crime of perjury is that the false testimony be given wilfully. The statute provides in part that a defendant is guilty of perjury when he wilfully states any material matter which he does not believe to be true.

Now initially I should like to instruct you that to act wilfully does not mean that one knew that he is violating a particular statute. In order to act wilfully it's only required that the act be knowingly and deliberately committed with the specific intent to do

something which the law forbids. In other words, to act wilfully is to act with bad purpose either to disobey or disregard the law.

The words "knowingly" and "wilfully" are therefore opposed to the idea of an inadvertent or accidental misstatement. For example, if the defendant by innocent mistake made an erroneous or incorrect statement he may not be found guilty of the crime of perjury.

Similarly, if you find that the defendant while [18] under oath gave factually incorrect testimony because of surprise, confusion, haste, inadvertence, negligence or an honest belief that he was telling the truth he may not be found guilty of perjury.

Thus, in order to convict you must be satisfied beyond a reasonable doubt that any false testimony given was knowingly and wilfully made with knowledge that it was false and with an intent to deceive.

Thus, if you find that at the time the defendant gave his testimony before the referee in bankruptcy he was aware of the fact that he was making a false statement and knew and believed that his statement was false when made, then he was acting knowingly and wilfully as these terms are used in the statute governing the crime of perjury.

U.S. GOVERNMENT PRINTING OFFICE: 1972

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1011

SAMUEL BRONSTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

Petitioner Samuel Bronston submits the following for his reply brief.

I. The Ambiguity Here, Which the Government Virtually Concedes, Was Not an Issue Submitted to the Jury Nor One Which Falls Exclusively Within the Jury's Province.

The Government now virtually concedes that the questioning was ambiguous (Gov. Brief, p. 9). Admitting that "you" could refer (a) to the company, or (b) to the individual, or (c) to both, the Government argues that only (b)

and (c) were "reasonable" interpretations. The Government further argues that "the most reasonable interpretation of the word 'you' employed by the examiner" was that it referred to them both. (*Id.*)

It is by no means self-evident that the question was not intended to ask about the company's accounts only; this was an examination directed to the assets of the company, in which the individual's assets would be involved only secondarily. Nor was the preceding question clearly directed at personal accounts, as the Government argues (Gov. Brief, fn. 4, p. 9). In the preceding question, "Do you have any bank accounts in Swiss banks, Mr. Bronston?", the words "Mr. Bronston" were used to address the witness, not to state the name in which an account was held, as the Government's brief seems to suggest. The witness still had to determine whether "you" referred to him or the company or both.

The main point on the ambiguity issue is that if perjury is to be charged, we should not have to guess at the meaning of the questions. As the comments to the Model Penal Code put it:

> "It does not seem unfair to require official interrogation to be sufficiently specific so that the verity of declarant's statements can be measured against something else than a guess as to how he interpreted the question." American Law Institute, Model Penal Code (Tent. Draft No. 6, 1957), § 208.20, Comments, p. 120.

The Government also argues that the question of ambiguity was submitted to the jury and is therefore foreclosed by the jury's verdict. There are two flaws, however, with this argument. The first is that the issue of whether the questioning was sufficiently precise to support a conviction for perjury has been considered in the cases as a question of law and should be so treated. See cita-

tions and argument at pages 12-13 of Petitioner's Brief. There was no evidence in the trial that bore on the question of ambiguity except the words of the 21(a) examination, which are as much before this Court as they were before the jury.

The second flaw in the Government's argument is apparent on a reading of the Court's charge, which shows that the issue of ambiguity before this Court was not given to the jury. The District Judge charged the jury on ambiguity only with respect to the second count, on which there was an acquittal, not to the first count, which is the subject of this appeal. The charge on ambiguity reads:

> "Now before we consider the second and third elements of the crimes charged I think a few observations would be in order.
>
> First, you are instructed that if you find that the defendant did not understand a particular question put to him by the questioner and therefore gave a non-responsive answer, that answer cannot be perjurious. One cannot wilfully state a falsehood in response to a question he does not understand.
>
> Similarly, *if you conclude that the questions were less precise than they should have been, this may not be permitted to prejudice the defendant. This may be relevant with regard to count 2 of the indictment,* for you must decide whether or not the questioner and witness understood the words 'ownership' and 'interests' to have the same meaning. This is, count 2 essentially charges that the defendant wilfully and knowingly falsely testified that the Spanish government owned the film Sinfonia Espanola and that he and the companies in which he had an interest did not own and have an interest in the film.
>
> If you conclude that there was no meeting of the minds, that the questioner and the witness did not understand the words 'own' and 'interest' in the same

sense, then you must acquit the defendant on the second count.

Thus, in order to convict on count 2 you must be satisfied beyond a reasonable doubt that the defendant understood the terms used but nevertheless willfully gave a false answer.*'" (Emphasis added)

Govt. App. p. 44-5

The citations from the District Judge's charge in the Government's brief, insofar as they deal with the issue of ambiguity, were thus directed toward the deliberations on the other count, not on the count before this Court. The Government's reliance on the charge and the jury's verdict is misplaced.

II. The Chamber of Horrors Conjured Up by the Government Arises From a Faulty Analysis.

The Government conjures up a chamber of horrors and attempts to imagine situations where, if petitioner prevails, witnesses can lie with impunity in the future through the device of material omissions. (Gov. Br., p. 19). This argument misstates the issue before this Court with respect to a truthful but unresponsive answer. (See Point I of Petitioner's Brief.)

No one questions the proposition that a responsive answer containing material omissions is a false statement. That type of answer, however, is not present in this case. Here we had a truthful answer, which, if the questioning is assumed to be unambiguous, and to refer to personal accounts, was at worst unresponsive. An answer's unresponsiveness does not deceive, as a material omission does; it can be corrected by further questioning. An an-

* One should remember moreover that the charge was delivered without the paragraphing inserted in the transcript.

swer that purports to be responsive evades correction through further questioning.

The point may be seen clearly by an analysis of the example with which the Government closes its brief. The Government argues:

> "For example, if a witness answers the question 'Who attended the meeting of June 1?' with the statement 'Smith and Brown,' it will be necessary to ask the further question 'Anyone else?' since the witness could, under petitioner's view of perjury, freely suppress the information that Jones and Robinson also attended." Gov. Brief, p. 20

This example misses the thrust of petitioner's argument. In the example the answer is false because it purports to be responsive but contains material omissions. The Government's hypothetical would, however, provide an accurate analogy to the instant case if, for example, with respect to a meeting attended by people of different races, the question asked was "Who attended the meeting of June 1?" and the witness answered, "Smith and Brown were the black men present." Assuming that this was true, but that Jones and Robinson, white men, were also present, the answer would be unresponsive. It would be apparent to the questioner that the answer was limited to one class of men, and thus unresponsive to the general question. It places no unreasonable burden on the questioner, to form a foundation for a charge of perjury, to require him, if he wants to ask about the presence of men who were white, or of races other than black, to ask the next obvious question, just as here the questioner, when receiving an answer about company accounts, if he wished to know about personal accounts, should have asked about them. Then if the responsive answer were false, by reason of material omissions or otherwise, there would be perjury; but if it were true, there would not be perjury.

Perjury arises only from a false statement, which is absent in the instant case.

To put it more analytically, if the answer purports to predicate facts of a class more limited than that referred to by the questioner, such an answer is unresponsive, but the proposition contained in the answer may still be truthful, as it was here. In the Government's example, the answer purported to give information about the same class as that referred to by the questioner. That answer, when it omitted facts, was false. Therein lies the distinction.

New York, New York, August 30, 1972.

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(Slip Opinion)

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

BRONSTON *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 71–1011. Argued November 15, 1972—
Decided January 10, 1973

Federal perjury statute, 18 U. S. C. § 1621, does not reach a witness' answer that is literally true, but unresponsive, even assuming the witness intends to mislead his questioner by the answer, and even assuming the answer is arguably "false by negative implication." A perjury prosecution is not, in our adversary system, the primary safeguard against errant testimony: given the incongruity of an unresponsive answer, it is the questioner's burden to frame his interrogation acutely to elicit the precise information he seeks. Pp. 5–10.

453 F. 2d 555, reversed.

BURGER, C. J., delivered the opinion for a unanimous Court.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 71–1011

Samuel Bronston, Petitioner, *v.* United States. | On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[January 10, 1973]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted the writ in this case to consider a narrow but important question in the application of the federal perjury statute, 18 U. S. C. § 1621: [1] whether a witness may be convicted of perjury for an answer, under oath, that is literally true but not responsive to the question asked and arguably misleading by negative implication.

Petitioner is the sole owner of Samuel Bronston Productions, Inc., a company that between 1958 and 1964, produced motion pictures in various European locations. For these enterprises, Bronston Productions, Inc., opened bank accounts in a number of foreign countries; in 1962, for example, it had 37 accounts in five countries. As

[1] 18 U. S. C. § 1621 provides:

"Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States."

president of Bronston Productions, Inc., petitioner supervised transactions involving the foreign bank accounts.

In June of 1964, Bronston Productions, Inc., petitioned for an arrangement with creditors under Chapter XI of the Bankruptcy Act, 11 U. S. C. § 701 *et seq.* On June 10, 1966, a referee in bankruptcy held a § 21 (a) hearing to determine, for the benefit of creditors, the extent and location of the company's assets.[2] Petitioner's perjury conviction was founded on the answers given by him as a witness at that bankruptcy hearing, and in particular on the following colloquy with a lawyer for a creditor of Bronston Productions, Inc.:

"Q. Do you have any bank accounts in Swiss banks, Mr. Bronston?

"A. No, sir.

---

[2] Under § 334 of the Bankruptcy Act, 11 U. S. C. § 734, the court must hold a first meeting of creditors within a limited period of time after the Chapter XI petition is filed. Section 336, 11 U. S. C. § 736, provides that the judge or court appointed referee shall preside at the meeting and "[s]hall examine the debtor or cause him to be examined and hear witnesses on any matter relevant to the proceedings."

Section 21 (a) of the Act, 11 U. S. C. § 44 (a), is applicable to a Chapter XI proceeding because it is a provision of Chapter I through VII "not inconsistent or in conflict with the provisions of [Chapter XI]." 11 U. S. C. § 702. Section 21 (a) provides, in pertinent part, that "[t]he court may, upon application of any officer, bankrupt, or creditor, by order require any designated persons . . . to appear before the court . . . to be examined concerning the acts, conduct or property of a bankrupt." Numerous statements of the broad scope of a § 21 (a) inquiry are collected in Collier on Bankruptcy ¶ 21.11 (1964). The officers of a bankrupt may be required to undergo § 21 (a) examination even if they are not still officers at the time of filing. *Id.*, ¶ 21.09. If it appears that the interest of a witness is adverse to the party calling him to testify, under § 21 (j), 11 U. S. C. § 44 (j), the party may examine the witness as if under cross-examination, and the examining party is not bound by the witness' testimony. *Id.*, ¶ 5.22.

"Q. Have you ever?

"A. The company had an account there, for about six months, in Zurich.

"Q. Have you any nominees who have bank accounts in Swiss banks?

"A. No, sir.

"Q. Have you ever?

"A. No, sir."

It is undisputed that for a period of nearly five years, between October 1959 and June 1964, petitioner had a personal bank account at the International Credit Bank in Geneva, Switzerland, into which he made deposits and upon which he drew checks totaling more than $180,000. It is likewise undisputed that petitioner's answers were literally truthful. (a) Petitioner did not at the time of questioning have a Swiss bank account. (b) Bronston Productions, Inc., did have the account in Zurich described by petitioner. (c) Neither at the time of questioning nor before did petitioner have nominees who had Swiss accounts. The Government's prosecution for perjury went forward on the theory that in order to mislead his questioner, petitioner answered the second question with literal truthfulness but unresponsively addressed his answer to the company's assets and not to his own—thereby implying that he had no personal Swiss bank account at the relevant time.

At petitioner's trial, the District Court instructed the jury that the "basic issue" was whether petitioner "spoke his true belief." Perjury, the court stated, "necessarily involves the state of mind of the accused" and "essentially consists of wilfully testifying to the truth of a fact which the defendant does not believe to be true"; petitioner's testimony could not be found "wilfully" false unless at the time his testimony was given petitioner "fully understood the questions put to him but nevertheless gave false answers knowing the same to be false."

The court further instructed the jury that if petitioner did not understand the question put to him and for that reason gave an unresponsive answer, he could not be convicted of perjury. Petitioner could, however, be convicted if he gave an answer "not literally false but when considered in the context in which it was given, nevertheless constituted a false statement."[3] The jury began its deliberations at 11:30 a. m. Several times it requested exhibits or additional instructions from the court, and at one point, at the request of the jury, the District Court repeated its instructions in full. At 6:10 p. m., the jury returned its verdict, finding petitioner guilty on the count of perjury before us today and not guilty on another charge not here relevant.

In the Court of Appeals, petitioner contended, as he had in post-trial motions before the District Court, that the key question was imprecise and suggestive of various

---

[3] The District Court gave the following example "as an illustration only":

"[I]f it is material to ascertain how many times a person has entered a store on a given day and that person responds to such a question by saying five times when in fact he knows that he entered the store 50 times that day, that person may be guilty of perjury even though it is technically true that he entered the store five times."

The illustration given by the District Court is hardly comparable to petitioner's answer; the answer "five times" is responsive to the hypothetical question and contains nothing to alert the questioner that he may be sidetracked. See p. 6, *infra*. Moreover, it is very doubtful that an answer which, in response to a specific quantitative inquiry, baldly understates a numerical fact can be described as even "technically true." Whether an answer is true must be determined with reference to the question it purports to answer, not in isolation. An unresponsive answer is unique in this respect because its unresponsiveness by definition prevents its truthfulness from being tested in the context of the question—unless there is to be speculation as to what the unresponsive answer "implies." See p. 7, *infra*.

interpretations. In addition, petitioner contended that he could not be convicted of perjury on the basis of testimony that was concededly truthful, however unresponsive. A divided Court of Appeals held that the question was readily susceptible of a responsive reply and that it adequately tested the defendant's belief in the veracity of his answer. The Court of Appeals further held that, "[f]or the purpose of 18 U. S. C. § 1621, an answer containing half of the truth which also constitutes a lie by negative implication, when the answer is intentionally given in place of the responsive answer called for by a proper question, is perjury." In this Court, petitioner renews his attack on the specificity of the question asked him and the legal sufficiency of his answer to support a conviction for perjury. The problem of the ambiguity of the question is not free from doubt, but we need not reach that issue. Even assuming, as we do, that the question asked petitioner specifically focused on petitioner's personal bank accounts, we conclude that the federal perjury statute cannot be construed to sustain a conviction based on petitioner's answer.

The statute, 18 U. S. C. § 1621, substantially identical in its relevant language to its predecessors for nearly a century, is "a federal statute enacted in an effort to keep the course of justice free from the pollution of perjury." *United States* v. *Williams*, 341 U. S. 58, 68 (1951). We have held that the general federal perjury provision is applicable to federal bankruptcy proceedings. *Hammer* v. *United States*, 271 U. S. 620 (1926). The need for truthful testimony in a § 21 (a) bankruptcy proceeding is great, since the proceeding is "a searching inquiry into the condition of the estate of the bankrupt, to assist in discovering and collecting the assets and to develop facts and circumstances which bear upon the question of discharge." *Travis* v. *United*

States, 123 F. 2d, 268, 271 (CA10 1941). Here, as elsewhere, the perpetration of perjury "well may affect the dearest concerns of the parties before a tribunal. . . ." *United States* v. *Norris*, 300 U. S. 564, 574 (1937).

There is, at the outset, a serious literal problem in applying § 1621 to petitioner's answer. The words of the statute confine the offense to the witness who "willfully . . . states any material matter which he does not believe to be true." Beyond question, petitioner's answer to the crucial question was not responsive if we assume, as we do, that the first question was directed at personal bank accounts. There is indeed an implication in the answer to the second question that there was never a personal bank account; in casual conversation this interpretation might reasonably be drawn. But we are not dealing with casual conversation and the statute does not make it a criminal act for a witness to wilfully state any material matter *which implies* any material matter which he does not believe to be true.[4]

The Government urges that the perjury statute be construed broadly to reach petitioner's answer and thereby fulfill its historic purpose of reinforcing our adversary factfinding process. We might go beyond the precise words of the statute if we thought they did not adequately express the intention of Congress, but we perceive no reason why Congress would intend the drastic sanction of a perjury prosecution to cure a testimonial mishap which could readily have been reached with a

[4] Petitioner's answer is not to be measured by the same standards applicable to criminally fraudulent or extortionate statements. In that context, the law goes "rather far in punishing intentional creation of false impressions by a selection of literally true representations, because the actor himself generally selects and arranges the representations." In contrast, "under our system of adversary questioning and cross-examination, the scope of disclosure is largely in the hands of counsel and presiding officers." A. L. I. Model Penal Code § 208.20, Comment (Tent. Draft. No. 6, 1957).

single additional question by counsel alert—as every examiner ought to be—to the incongruity of petitioner's unresponsive answer. Under the pressures and tensions of interrogation, it is not uncommon for the most earnest witnesses to give answers which are not entirely responsive. Sometimes the witness does not understand the question, or may in an excess of caution or apprehension read too much or too little into it. It should come as no surprise that a participant in a bankruptcy proceeding may have something to conceal and consciously tries to do so, or that a debtor may be embarrassed at his plight and yields information reluctantly. It is the responsibility of the lawyer to probe; testimonial interrogation, and cross-examination in particular is a probing, prying, pressing form of inquiry. If a witness evades, it is the lawyer's responsibility to recognize the evasion and to bring the witness back to the mark, to flush out the whole truth with the tools of adversary examination.

It is no answer to say that here the jury found that petitioner intended to mislead his examiner. A jury should not be permitted to engage in conjecture whether an unresponsive answer, true and complete on its face, was intended to mislead or divert the examiner; the state of mind of the witness is relevant only to the extent that it bears on whether "he does not believe [his answer] to be true." To hold otherwise would be to inject a new and confusing element into the adversary testimonial system we know. Witnesses would be unsure of the extent of their responsibility for the misunderstandings and inadequacies of examiners, and might well fear having that responsibility tested by a jury under the vague rubric of "intent to mislead" or "perjury by implication." The seminal modern treatment of the history of the offense concludes that one consideration of policy overshadowed all others during the

years when perjury first emerged as a common law offense: "That the measures taken against the offense must not be so severe as to discourage witnesses from coming forward to testify." New York Law Reform Commission, Study on Perjury 23 (1935). A leading 19th century commentator, quoted by Dean Wigmore, noted that the English law "throws every fence around a person accused of perjury," for

> "the obligation of protecting witnesses from oppression or annoyance, by charges or threats of charges having borne false testimony, is far paramount to that of giving even perjury its cure; and the law of England relies, for this purpose, on the means provided for detecting and exposing the crime at the moment of commission—such as publicity, cross-examination, the aid of a jury, etc., and on the infliction of a severe though not excessive punishment, wherever the commission of the crime has been clearly proved." Best, Principles of Evidence §§ 605–606 (Chamberlayne ed. 1848).

Addressing the same problem, Montesquieu took as his starting point the French tradition of capital punishment for perjury and the relatively mild English punishment of the pillory. He thought the disparity between the punishments could be explained because the French did not permit the accused to present his own witnesses, while in England "they admit of witnesses on both sides and the affair is discussed in some measure between them; consequently, false witness is there less dangerous, the accused having a remedy against the false witnesses which he has not in France." Montesquieu, The Spirit of the Laws, quoted in New York Law Reform Commission, Study on Perjury 27.

Thus we must read § 1621 in light of our own and the traditional Anglo-American judgment that a prosecution

for perjury is not the sole, or even the primary, safeguard against errant testimony. While "the lower federal courts have not dealt with the question often," and while their expressions do not deal with unresponsive testimony and are not precisely in point, "it may be said that they preponderate against the respondent's contention." *United States* v. *Norris, supra,* at 576. The cases support petitioner's position that the perjury statute is not to be loosely construed, nor the statute invoked simply because a wily witness succeeds in derailing the questioner—so long as the witness speaks the literal truth. The burden is on the questioner to pin the witness down to the specific object of the questioner's inquiry. *United States* v. *Wall,* 371 F. 2d 398 (CA6 1967); *United States* v. *Slutsky,* 79 F. 2d 504 (CA3 1935); *Galanos* v. *United States,* 49 F. 2d 898 (CA6 1931); *United States* v. *Cobert,* 227 F. Supp. 915 (SD Cal. 1964).

The Government does not contend that any misleading or incomplete response must be sent to the jury to determine whether a witness committed perjury because he intended to sidetrack his questioner. As the Government recognizes, the effect of so unlimited an interpretation of § 1621 would be broadly unsettling. It is said, rather, that petitioner's testimony falls within a more limited category of intentionally misleading responses with an especially strong tendency to mislead the questioner. In the federal cases cited above, the Government tells us the defendants gave simple negative answers "that were both entirely responsive and entirely truthful. . . . In neither case did the defendant—as did petitioner here—make affirmative statements of one fact that in context constituted denials by negative implication of another, related fact." Thus the Government isolates two factors which are said to require application of the perjury statute in the circumstances of this case:

the unresponsiveness of petitioner's answer and the affirmative cast of that answer, with its accompanying negative implication.

This analysis succeeds in confining the Government's position, but it does not persuade us that Congress intended to extend the coverage of § 1621 to answers unresponsive on their face but untrue only by "negative implication." Though perhaps a plausible argument can be made that unresponsive answers are especially likely to mislead,[5] any such argument must, we think, be predicated upon the questioner's being aware of the unresponsiveness of the relevant answer. Yet, if the questioner is aware of the unresponsiveness of the answer, with equal force it can be argued that the very unresponsiveness of the answer should alert counsel to press on for the information he desires. It does not matter that the unresponsive answer is stated in the affirmative, thereby implying the negative of the question actually posed; for again, by hypothesis, the examiner's awareness of unresponsiveness should lead him to press another question or reframe his initial question with greater precision. Precise questioning is imperative as a predicate for the offense of perjury.

It may well be that petitioner's answers were not guileless but were shrewdly calculated to evade. Nevertheless, we are constrained to agree with Judge Lumbard,

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[5] Arguably, the questioner will assume there is some logical justification for the unresponsive answer, since competent witnesses do not usually answer in irrelevancies. Thus the questioner may conclude that the unresponsive answer is given only because it is intended to make a statement—a negative statement—relevant to the question asked. In this case, petitioner's questioner may have assumed that petitioner denied having a personal account in Switzerland; only this unspoken denial would provide a logical nexus between inquiry directed to petitioner's personal account and petitioner's adversion, in response, to the company account in Zurich.

who dissented from the judgment of the Court of Appeals, that any special problems arising from the literally true but unresponsive answer are to be remedied through the "questioner's acuity" and not by a federal perjury prosecution.

Reversed.